Supreme Court, U.S.
FILED
SEP 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

89-510
No. _____

In The

Supreme Court of the United States

October Term, 1989

LARRY R. MEACHUM, COMMISSIONER,
CONNECTICUT DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

WAYNE B. ALEXANDER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment requires suppression of a jailhouse statement made by a prisoner to his friend where: (1) the friend voluntarily informs police, on a continuing basis, of the information confided to him by the prisoner; (2) the friend requests and receives police transportation to and from the prison; and (3) the information pertains to murder, an offense which was uncharged at the time the statement was made.

2. Whether a judgment of the Court of Appeals must be vacated where, without applying the presumption of correctness mandated by 28 U.S.C. § 2254 (d) and without complying with the dictates of *Sumner v. Mata*, 449 U.S. 531 (1981), the Court of Appeals relied upon its own findings of fact, which are contrary to those of a state trial court and state supreme court and are unsupported by the record.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Larry R. Meachum, the Commissioner of Corrections for the State of Connecticut, respectfully petitions that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on May 26, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 876 F.2d 277 and is

reprinted in the appendix, p. A-1, *infra*. The memorandum decision of the United States District Court for the District of Connecticut is reprinted in the appendix, p. A-16, *infra*. The decision is unreported. The opinion of the Connecticut Supreme Court affirming Alexander's state court murder conviction is reported sub. nom. *State v. Alexander*, 197 Conn. 181, 496 A.2d 486 (1987). It is reprinted in the appendix, p. A-30.

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit granting the petition for a writ of habeas corpus was entered on May 26, 1989; the order denying the timely petition for rehearing was entered on June 28, 1989. A copy of these orders appears in the appendix, p. A-41 to 43, *infra*. The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

United States Code, Title 28, § 2254(d) provides:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in

custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the

> Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

Respondent Wayne Alexander, in a statement whose admissibility is not at issue in this proceeding, confessed to the killing of a 19-year-old retarded man. His murder conviction was unanimously affirmed by the Connecticut Supreme Court. Subsequently, his petition for a writ of habeas corpus was rejected by the federal district court. The United States Court of Appeals for the Second Circuit reversed, concluding that although Alexander's confession was properly admitted at trial, a subsequent statement revealing the location of the victim's body was obtained and admitted at trial in violation of his Fifth Amendment rights.

Although both statements had been made to a friend visiting Alexander in jail at his request, the Court of

Appeals found that after the first confession the friend became an "undisclosed implied government agent," thus triggering the protections of the Fifth Amendment. The State of Connecticut was ordered to retry Alexander within a reasonable period of time or to release him.

A. Facts Underlying Alexander's Murder Conviction

The criminal charges against Alexander arose from the death of Vern Alan Cook. Cook and Alexander were scheduled to appear together in state court in January, 1979 to answer to minor criminal charges. In the early morning of the date on which they were to appear, the courthouse was seriously damaged by fire, and their appearances were rescheduled. Cook failed to appear on the appointed day and was never again seen alive.

Alexander confessed to the courthouse fire approximately one month later and implicated Cook as his accomplice. Alexander was arrested, charged with arson and held at the Hartford Correctional Center; an arrest warrant also was obtained for Cook.

James Papagolas, a friend of both Alexander and Cook, visited Alexander at the Correctional Center at Alexander's request. Their first visit was on the morning of March 14, 1979; there is no record regarding their conversation on that date. Later that day two Connecticut state troopers approached Papagolas after he was observed removing items from Alexander's automobile, which was parked in a private lot. Papagolas explained that he was a friend of Alexander's and was acting at his request. He told the officers that he had visited Alexander in jail.

Papagolas acknowledged that he also knew Cook. One of the officers gave Papagolas his business card and Papagolas said he would contact police if he saw Cook or heard anything regarding his whereabouts.

On March 17, Alexander's attorney contacted the state police by telephone and stated that he wished to be present if his client were questioned.

Papagolas' next visit to Alexander was on the afternoon of March 19. Papagolas told Alexander that the police had been talking to him and asking questions about Cook. He asked Alexander whether he had killed Cook and Alexander replied, "Well, for your own peace of mind, yes I did." R. at 22.[1] Papagolas asked whether the body was well hidden and Alexander said that at first he believed it was but that he was no longer certain. At the conclusion of the visit, Alexander asked Papagolas to visit him again that evening.

Papagolas left the correctional center and immediately telephoned the state police to inform them of the confession. The officers agreed to meet with Papagolas at a local restaurant to discuss the matter. Because the officers knew Papagolas to be a friend of Alexander they were suspicious of Papagolas' actions in relaying the confession to them. R. at 21, 41. A computer check on Papagolas made subsequent to his telephone call but prior to their meeting revealed that Papagolas' driver's license had been suspended.

During their conversation at the restaurant, the officers asked whether Papagolas intended to visit Alexander again and he replied that he did. Confronted with the

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[1] Unless otherwise noted, record references are to the trial court suppression hearing.

officers' knowledge that he had no valid driver's license, Papagolas agreed with the officers that they would transport him to the correctional facility that evening. The primary purpose of the police in transporting Papagolas was to learn more about him and to verify the information he was providing. R. at 38, 68. Papagolas' recollection was that he asked the officers to give him a ride. R. at 98.[2]

The officers transported Papagolas to the jail on the evening of March 19. During that visit Alexander was agitated because he believed the police might find Cook's body; he asked Papagolas to visit him again the following day.

The officers again transported Papagolas to the jail on the evening of March 20. Alexander was increasingly agitated because he was aware the officers were speaking with Papagolas. Papagolas indicated his willingness to help dispose of the body and Alexander said that he would have his wife contact Papagolas if he needed his help.

Alexander's wife contacted Papagolas the following day, but Papagolas took no immediate action.

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[2] The officers at this time knew very little about Papagolas and were "very suspicious" and "very concerned" about Papagolas' involvement in Cook's disappearance. One officer testified that "at that point we didn't know exactly what we had. We were just still investigating what we considered a missing person's case. Mr. Papagolas had given us this information. We didn't really understand where he stood in all of this, what he was or who he was." R. at 67.

Papagolas, transported by police, next visited Alexander on March 22. During this visit, Alexander described the location of the body and asked Papagolas to put lime on the body so that it would decompose more quickly. Alexander also threatened to kill Papagolas if he revealed this information to police. Immediately after the visit Papagolas relayed this information to police, who found the body in the wooded area Alexander had described.

B. Summary Of Lower Court Decisions

The state trial court, following a full evidentiary hearing at which Papagolas and the officers testified, denied Alexander's motion to suppress the two statements. The court found that both statements were voluntary and were prompted simply by Alexander's desire to conceal his guilt. Papagolas was a private citizen, not a police agent, and there was no constitutional bar to the police continuing to investigate Cook's whereabouts and to continue to listen to the information Papagolas provided.

The Connecticut Supreme Court, which independently examined the record on the agency issue, concluded that the trial court's factual finding was supported by substantial evidence. In concluding that no agency relationship existed between Papagolas and the police, the court found that although the police may have supported and even encouraged Papagolas' efforts to obtain information, the officers did not seek out Papagolas and were not involved in his initial decision to visit Alexander. The police did not direct Papagolas' activities and

provided him with no reward for the information he provided.[3]

Alexander subsequently sought federal habeas corpus relief pursuant to 28 U.S.C. §2254. A federal magistrate concluded that Papagolas, a private citizen, was not acting as an agent of police and, consistent with the state court findings of fact, found that Papagolas' relationship with Alexander antedated any contact between Papagolas and the police. Papagolas was not a police "plant" or "bait". Additionally, Papagolas questioned Alexander solely to satisfy his own curiosity. The police were not obligated, the magistrate concluded, to discourage Papagolas from either accepting Alexander's invitations to visit or from reporting what he had learned.[4]

The Court of Appeals reversed, finding that although Papagolas was at first a private citizen, he was transformed into an agent by the officers' actions between the time Alexander made his first statement on March 19 and the time he revealed the location of the body on March 22. Additionally, the Court of Appeals found that the confession was not voluntary but was a product of the

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[3] The Connecticut Supreme Court did not conclude that classification of Papagolas as a police agent necessarily would have resulted in the finding of a constitutional violation. Rather, the court found that the disposition of the threshold agency issue obviated the need to consider other possible impediments to the Fifth Amendment claim.

[4] The magistrate's recommended decision subsequently was adopted by the district court.

"inherent psychological pressures of the jail environment" coupled with Papagolas' questioning.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT NEEDS TO BE, DECIDED BY THIS COURT. THE COURT OF APPEALS HAS DECIDED THE QUESTION IN A WAY WHICH CONFLICTS IN PRINCIPLE WITH *MIRANDA V. ARIZONA* AND EXTENDS THE MEANING OF "CUSTODIAL INTERROGATION" AND "COMPELLED SELF-INCRIMINATION" BEYOND THE SCOPE OF THE FIFTH AMENDMENT.

This Court on numerous occasions has acknowledged both the necessity of secret informants in police work and the private citizen's duty to report criminal activity to the appropriate authorities.[5]

> In the words of Judge Learned Hand, 'Courts have countenanced the use of informers from time immemorial, in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly.

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[5] The State of Connecticut does not concede that Papagolas became an "agent" of the police. See issue II, *infra*. For the purposes of this discussion, however, the State assumes that the Court of Appeals' characterization of Papagolas as an "agent" was accurate.

Hoffa v. United States, 385 U.S. 293, 311 (1966). *See also, Weatherford v. Bursey*, 429 U.S. 545, 557 (1977); *United States v. Russell*, 411 U.S. 423, 432 (1973).

The practical effect of the Court of Appeals' decision in this case is to create confusion and uncertainty regarding the techniques the police may use to investigate new allegations against an individual already in custody on another matter, and the extent to which police can lawfully interact with private citizens who are providing them with useful information. Such confusion not only impairs the ability of the courts to apply a consistent standard in adjudicating claims arising in this context, but also frustrates the efforts of law enforcement officers who recognize informants as a valuable tool and who seek to use them without transgressing constitutional restrictions.

A. This Case Raises A Question Previously Undecided By This Court

Assuming the Court of Appeals' characterization of Papagolas as a police "agent" is accurate, the question of whether police may use a secret informant to obtain information from an incarcerated person prior to arraignment is squarely before the Court in this case.[6]

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[6] The issue of whether questioning by an undisclosed undercover agent constitutes *per se* custodial interrogation for *Miranda* purposes also has been raised in *People v. Perkins*, No. 88-1972. The State of Illinois' certiorari petition was filed June 5, 1989 and has been carried over to the 1989-90 docket.

In *Hoffa v. United States*, 385 U.S. 293 (1966), this Court held that the defendant's Fifth Amendment rights were not violated when the government placed a secret informer in his hotel room during a criminal trial. The information thus obtained was admissible against the defendant in a subsequent trial on a different charge.

The defendant's conversations with the agent in *Hoffa* were voluntary. "For that reason, if for no other, it is clear that no right protected by the Fifth Amendment privilege against compulsory self-incrimination was violated in this case." *Hoffa*, 385 U.S. at 304.

Left open was the question of whether a different result would obtain if Hoffa had been incarcerated during his trial and had been visited by the agent in a jail cell rather than a hotel room.

Subsequently, in *United States v. Henry*, 447 U.S. 264 (1980) this Court found the defendant's Sixth Amendment right to counsel violated by the admission of statements made by him to a government informant after indictment and while he was in police custody. Discussion of the Fifth Amendment was limited to the comment, in *dicta*, that "the Fifth Amendment has been held not to be implicated by the use of under cover Government agents before charges are filed because of the absence of the potential for compulsion." *Henry*, 447 U.S. at 272. It is unclear whether this statement was intended to be explicitly applicable to the custodial situation present in *Henry* or was simply a summary of general Fifth Amendment principles. In *Michigan v. Jackson*, 475 U.S. 625, 632 (1986), this Court contrasted Fifth and Sixth Amendment protections by noting that the surreptitious employment of a

cellmate may violate the Sixth Amendment "even though the same methods of investigation *might have been permissible* before arraignment or indictment." (emphasis supplied)

As these cases indicate, this Court has yet to determine whether the general rule, that the Constitution offers no protection from misplaced confidence and unwitting self-incrimination, continues to apply in a custodial setting. *See, e.g.* Y. Kamisar, "What Is Interrogation," 67 Geo. L.J. 1, 48 (1978).

In the instant case, the circumstances of Alexander's statement to Papagolas were fully developed at a pre-trial hearing at which both Papagolas and the police officers testified and were subject to cross-examination. This is an appropriate case for this Court to grant the petition in order to resolve an important question which has been left open by previous decisions.

B. Decision Conflicts In Principle With This Court's Prior Decisions

The precise basis of the Court of Appeals' decision in the present case is elusive, resting variously upon perceived violations of Alexander's "fifth amendment right to counsel", his "implicit fifth amendment privilege against self-incrimination pursuant to *Miranda*," and his "implicit fifth amendment rights under *Miranda*."[7]

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[7] This lack of clarity is reflected not only in the decision on the merits but also in the Court of Appeals' harmless error analysis. The conclusion that admission of the second

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Regardless of its basis, the Court of Appeals' conclusion conflicts in principle with *Miranda v. Arizona*, 384 U.S. 436 (1966); and its progeny and extends the meaning of "custodial interrogation" and "compelled self-incrimination" beyond the scope of the Fifth Amendment.

The sole concern of the Fifth Amendment is governmental coercion. *Colorado v. Connelly*, 479 U.S. 157 (1986). "Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." *United States v. Washington*, 431 U.S. 181, 187 (1977).

"Coercion" in the Fifth Amendment sense arises from the factual context in which admissions are made. The general inquiry is whether the circumstances of interrogation are so unfair or unreasonable as to render a subsequent confession involuntary. *Michigan v. Tucker*, 417 U.S. 433, 441 (1974); *New York v. Quarles*, 467 U.S. 649, 672 (1984). A defendant raising a self-incrimination claim under the Fifth Amendment ordinarily must first prevail in a voluntariness hearing before his confession is deemed to be coerced and therefore inadmissible. *New York v. Quarles*, 467 U.S. at 672. In *Miranda v. Arizona*,

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confession could not be harmless because the "state obviously thought . . . it would be necessary to locate Cook's body" fails to reflect any form of conventional harmless error analysis. *See Milton v. Wainwright*, 407 U.S. 371 (1972). The State does not rely upon this erroneous analysis as a reason for granting certiorari, but recognizes that the ultimate resolution of this matter may encompass the harmless error question.

however, this Court concluded that certain factual circumstances create an irrebuttable presumption that the resulting interrogation is coercive. The statements obtained are inadmissible unless the suspect, after appropriate warnings, fails to claim his Fifth Amendment privilege.

The Court of Appeals' decision thus rests upon one of two premises: either a conclusion that the surreptitious interrogation of an individual in a prison setting is inherently coercive in the *Miranda* sense, or a finding that the factual circumstances of the interrogation rendered the confession involuntary. This second possibility wholly disregards the findings of the lower courts and is discussed in section II, *infra*. The attempt to analogize the circumstances of this case to those giving rise to the prophylactic rule of *Miranda* is likewise unavailing.

Although the Court of Appeals' decision describes Alexander as giving in "to the inherent psychological pressures of the jail environment," coercion does not arise from the mere existence of custody. The presumption of coercion created by *Miranda* was predicated not on the presence of custody alone but from the interplay of police interrogation and the custodial environment. "[T]he coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained." *Minnesota v. Murphy*, 465 U.S. 420, 433, *reh'g denied*, 466 U.S. 945 (1984). Custodial arrest is said to convey to the suspect a message that he has no choice but to submit to the officers' will and to confess. *Minnesota v. Murphy*, 465 U.S. at 433, quoting *Miranda, supra*. The "overbearing compulsion [is] caused by isolation of a

suspect in police custody." *United States v. Washington*, 431 U.S. 181, 187, n.5 (1977).

In spite of this Court's repeated admonitions that the "extraordinary safeguard" of *Miranda* does not apply outside the context of the inherently coercive custodial interrogations for which it was designed; *Minnesota v. Murphy*, 465 U.S. 420, 430 (1984); the Court of Appeals has extended it to a situation in which Alexander had, and used, the power to summon and dismiss someone he regarded as a friend, and in which he could not have concluded that his responses would have any effect upon the duration or conditions of his incarceration. Alexander was not isolated or held incommunicado; it was his very access to visitors which led to the statement in question. It is a suspect's awareness that he is dealing with police that generates the "inherently compelling pressures" *Miranda* warnings are designed to dispel. Such pressures do not arise when the suspect is unaware he is dealing with an informant.

Perhaps unwilling to rely solely upon a conclusion that Alexander's statement was presumptively compelled by his incarceration, the Court of Appeals further suggests additional factors which may have given rise to coercion. The Court of Appeals focuses upon the fact that Papagolas was consciously attempting to elicit information from Alexander. In the Fifth Amendment context, however, the interrogator's knowledge and intent have no bearing on the propriety of the interrogation. *Minnesota v. Murphy*, 465 U.S. at 431. Uniformed police officers often consciously seek incriminating statements from suspects; such conduct does not trigger *Miranda* protections

in the absence of the type of custodial situation contemplated by that decision. *Beckwith v. United States*, 425 U.S. 341 (1976).

The Court of Appeals also concludes that Alexander's statement was "coerced" in part by the physical constraints arising from his incarceration.

The Fifth Amendment, however, is not concerned with moral and psychological pressures to confess emanating from sources other than official coercion. *Oregon v. Elstad*, 470 U.S. 298, 305-306 (1985). Although it is true that the psychological stress arising from Alexander's desire to hide the body was exacerbated by the limitations imposed by his incarceration, such an attenuated causal connection between the conduct of police and the statement extends the concept of "coercion" far beyond its present limitations.

> There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a "guilty secret" freely given in response to an unwarned but noncoercive question."
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> *Oregon v. Elstad*, 470 U.S. 298, 313 (1985).

This Court repeatedly has cautioned against expanding "currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries." *Colorado v. Connelly*, 479 U.S. 157 (1986). The Court of Appeals has undertaken precisely such an expansion and certiorari should be granted to provide guidance in this important area.

II. BY REVERSING A STATE MURDER CONVICTION WITHOUT DEFERENCE TO THE PRESUMPTION OF CORRECTNESS MANDATED BY 28 U.S.C §2254 (d), THE COURT OF APPEALS HAS SIGNIFICANTLY UNDERMINED THE PRECEDENTS OF THIS COURT AND HAS ERODED THE INTERESTS OF FEDERALISM UPON WHICH THE PRESUMPTION IS BASED

In rejecting the factual findings underlying the rulings of the Connecticut Supreme Court and trial court in the present case, the Court of Appeals said simply, "We disagree." The Court provided no explanation of why the presumption of correctness mandated by 28 U.S.C. §2254 should not apply to the state courts' factual determinations, even though those findings were accepted and confirmed by the district court. Neither the interests of federalism nor the decisions of this Court countenance such a cavalier rejection of state court findings. This is especially true when, as here, the "findings" of the Court of Appeals have no support in the record.

Although "agency" consistently has been regarded as a factual determination, the Court of Appeals disregarded without explanation the conclusion of every court below that Papagolas was acting as a private citizen. Appendix, pp. A-23, 36, 45. Without explicitly holding that the state court findings were not entitled to the presumption of correctness, the Court of Appeals focused on one remark made during the suppression hearing[8] and

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[8] Papagolas was asked if the police requested him to obtain additional information. He replied, "Yes, and I went along, you know, with my own curiosity, finding out, and they were also curious."

constructed a description of the interaction between the police and Papagolas that is completely at odds with the facts found by every other judge who heard the witnesses or reviewed the record. There is no evidence to support the Court of Appeals' conclusions that an unwilling Papagolas was "persuaded" by police to continue his visits to Alexander and that Papagolas' questioning was "carefully orchestrated" by the police. The uncontradicted testimony of every witness was that the police never suggested specific questions or lines of inquiry to Papagolas, who testified that he would have continued to visit Alexander even without police involvement.

Additionally, the Court of Appeals ignored a presumptively correct state court finding that Alexander's statement was voluntary and spontaneous – a finding supported by direct and uncontradicted hearing testimony regarding the circumstances of the statement. The Court of Appeals provides no clue as to what error of fact or law it believes was committed by the trial court judge who, having had the opportunity to view the witnesses and to assess their credibility, found there to be "no question whatsoever as to the voluntariness of the defendant's statements." The Court of Appeals' opinion fails even to refer to § 2254(d). *See Sumner v. Mata* (Sumner I), 449 U.S. 539, 547 (1981).[9]

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[9] If the Court of Appeals' decision established a rule that interrogation of an incarcerated person by an undercover agent is *per se* violative of the Fifth Amendment, the court's error was one of law, not fact. *See* Issue I, *supra*. The Court's reference to factors "beyond incarceration" that purportedly contributed to coercion, however, suggests that the Court simply may have substituted its own findings regarding voluntariness for those of the state courts.

Failure to accord the state court findings the deference to which they are entitled, and the disregard of an explicit requirement of a written explanation for such failure, clearly warrant exercise of this Court's supervisory powers. *See e.g. Marshall v. Lonberger*, 459 U.S. 422 (1981); *Sumner I, supra.*

The granting of certiorari is the only mechanism by which this Court can enforce its command that federal courts accord a high measure of deference to state court findings. The Court of Appeals' *de novo* construction of the facts occurred at great cost to the principles of finality and minimization of state and federal friction that 28 U.S.C. § 2254 was designed to advance. Review of this case will enable this Court to repair the harm done to these principles and to provide necessary guidance for future cases.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 378
August Term, 1988

Argued: November 10, 1988
Decided: May 26, 1989

Docket No. 88-2318

WAYNE B. ALEXANDER,

Petitioner-Appellant,

-against-

STATE OF CONNECTICUT,

Respondent-Appellee.

Before: LUMBARD, VAN GRAAFEILAND, and ALTIMARI, *Circuit Judges.*

Alexander, who was convicted of murder in Connecticut Superior Court, appeals from the dismissal of his petition for habeas corpus, Dorsey, *J.*, based on the alleged violation of his fifth amendment right to counsel by the admission into evidence of a confession elicited by an undisclosed implied state agent while Alexander was incarcerated on separate offense.

Reversed and remanded.

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LUMBARD, *Circuit Judge*:

Wayne Alexander, who was convicted in 1980 in the Connecticut Superior Court of having murdered Vern Alan Cook, appeals the dismissal of his writ of habeas corpus in the District of Connecticut, Dorsey, *J.* Alexander claims that the police used his friend James Papagolas as their undisclosed implied agent to interrogate him in the absence of counsel about the location of Cook's body. Alexander, who was incarcerated on a charge of arson when Papagolas questioned him, asserts that the trial court should have suppressed the second of two confessions he made to Papagolas because it was elicited in violation of his fifth amendment right to the assistance of counsel at custodial interrogations pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966).

Alexander made two confessions to Papagolas, the first on March 19, 1979, that he killed Cook, and the second on March 22, 1979, describing where he had hidden the body. We hold that, although Alexander's first confession was admissible, his second should have been suppressed. Alexander's fifth amendment right to counsel was not violated by the admission of his first confession because Papagolas, at that time, was not acting as a police agent. By the time the second confession was elicited, however, Papagolas was acting as an undisclosed implied state agent and his interrogation of Alexander violated his right to counsel. We accordingly reverse the judgement of the district court and remand for the entry

of an order granting the writ and the release of Alexander on the murder charge, unless he is retried within a reasonable time.

I.

Wayne Alexander and Vern Cook were codefendants in a third degree larceny case. On January 23, 1979, the day they were scheduled to appear in court in Rockville, Connecticut the courthouse was seriously damaged by fire. Their court appearances were therefore continued to February 6, 1979. When Cook failed to appear on that date, the state police began to search for him.

On March 9, 1979, Alexander admitted to the police that he had set the Rockville courthouse on fire and implicated Cook, who was still at large. Alexander was immediately arrested for arson.

Before taking Alexander to jail, four state police troopers accompanied him home to say goodbye to his wife and child. In the presence of the officers, Alexander received a call from his friend, James Papagolas. Papagolas frequently saw Alexander socially and had helped him find a job about two years earlier. Alexander told Papagolas that he had been arrested for arson and asked that he visit him in prison. He also said that the police suspected that Cook was dead. One of the officers, Sergeant John Jacewicz, testified that he noted Papagolas's name for future reference.

Papagolas and Alexander's wife were the only people listed by Alexander on his visiting card at the Hartford Correctional Center where he was held. On March

14, Papagolas visited Alexander. They discussed the arson and Alexander asked Papagolas to sell one of his cars in order to raise cash for Alexander's wife and to satisfy a debt that he owed Papagolas. After the visit, Papagolas drove to Rockville to prepare Alexander's car for sale. As he opened the trunk, Sergeant Jacewicz and Trooper John Rearick, who were patrolling the area, recognized the car and pulled up to question Papagolas about his relationship to Alexander. The officers asked Papagolas whether he knew Cook and his whereabouts and indicated they suspected that he had met with foul play. Papagolas said he did not know where Cook was and mentioned that he intended to visit Alexander again. He said he would let the police officers know if he heard anything about Cook.

Alexander had come to know Cook in the year before his arrest; Papagolas had been Cook's friend for over eight years. Cook often babysat for Papagolas's children and Papagolas once found him a job and let him stay in his home for several months.

On March 15, Papagolas visited Alexander without notifying the police. Later that day he had a conversation with Mrs. Alexander concerning any firearms Alexander might have. She said that if her husband kept any guns, they would be in the car.

The next day, March 16, Papagolas called Jacewicz and Rearick to say that he would be junking Alexander's car and had heard that it might contain weapons or ammunition. When the officers arrived, Papagolas had

just discovered some .38 caliber bullets in the glove compartment and handed them to the officers. The police asked him to call if he learned anything about Cook.

On March 17, Alexander's lawyer, who represented him on the arson charge, notified the police that his client did not wish to talk to the police without his being present.

On March 19, Papagolas drove to the Hartford jail without notifying the police. He told Alexander that the police had asked him about Coo . Papagolas said he had to know, "for his own peace of mind," whether Alexander killed Cook. After a moment of thought, Alexander replied, "for your peace of mind, I did." He explained that Cook had possessed information that could have incriminated Alexander. Papagolas immediately asked whether the body was well hidden. At first Alexander said it was, but then indicated he was not sure. He said he preferred not to talk about where the body was hidden. When the morning visiting period ended, Alexander asked Papagolas to return that evening.

Angry that Alexander had killed his friend, Papagolas wanted him to be punished for having done such "a useless, senseless act." He telephoned Jacewicz soon after he left the prison saying, "[y]ou guys were right. He's dead. I just talked to Wayne and he told me he did it." Jacewicz and Rearick immediately drove to meet him and Papagolas related his conversation with Alexander in detail.

Jacewicz asked Papagolas whether he intended to visit Alexander again. They told him they had conducted a routine check prior to meeting him that day, which

revealed that his driver's license had been suspended. They therefore agreed to provide him with transportation to and from the Hartford jail, which was about 20 miles from his home in Rockville.

The record is unclear as to the precise wording of the officers' questions. Jacewicz testified that although he and Rearick did not specifically tell Papagolas to go to the jail for them, they "certainly made it obvious" that they would gladly listen to any information he got. Papagolas told them he was confident that Alexander would eventually tell him where he had hidden the body. Papagolas testified that the police did not ask him to visit or speak to Alexander, but he admitted, on cross-examination, that he had previously testified that Jacewicz had offered him a ride and specifically asked him to get more information from Alexander. During the suppression hearing, Papagolas testified as follows:

Q. So it was your curiosity and the request from the Connecticut State Police meant nothing to you?

A. They asked me if I found anything out, would I tell them, and I said, yes, I would.

Q. They also asked you to see if you could get more information?

A. Yes, and I went along, you know, with my own curiosity, finding out, and they were also curious.

After Papagolas told Jacewicz and Rearick about Alexander's confession on the morning of March 19, he visited the jail three times, on the evening of March 19, on March 20 and on March 22. On each occasion the police picked Papagolas up in Rockville, drove him in their car

to the Hartford jail, waited for him in the parking lot and discussed his conversation with Alexander during the return trip.

When the police drove Papagolas home from his visit on the evening of March 19, the first occasion on which the police had provided him with transportation, he reported that Alexander was worried that Cook's body would also be found. Alexander did not want to tell Papagolas where he had hidden it. When Papagolas mentioned that Alexander had asked him to return the following day, Jacewicz and Rearick offered to drive him.

On the return trip from his visit to Alexander on the evening of March 20, Papagolas told Jacewicz and Rearick that during his visit Alexander said he did not feel comfortable that the police had been speaking to Papagolas and again expressed concern lest Cook's body be discovered. He hoped it would rain so that the body would decay more rapidly. Trying to trick Alexander into telling him where the body lay, Papagolas offered to cover it with lime to make it decompose more quickly. Alexander, however, repeated that he did not wish to disclose the body's location at that point, but would have his wife call Papagolas if he changed his mind. Alexander would only say that he picked Cook up in his car and drove him out of town to shoot him. The officers asked that Papagolas notify them if Mrs. Alexander called.

On March 21, Mrs. Alexander called Papagolas and asked him to visit her husband that evening. Papagolas, however, did not want to see him that day. That evening, when Jacewicz telephoned Papagolas to ask if Mrs. Alexander had called, he said he had not heard from her.

On the morning of March 22, Papagolas called Jacewicz and Rearick to tell them that he had received a message that Alexander wanted to speak to him; they picked him up at his place of business and transported him to the jail. During this visit, Alexander said he had reconsidered and wanted Papagolas to put lime on the body and remove any identification from it. Alexander told Papagolas that he would kill him if he disclosed the body's location. He then gave Papagolas precise directions to the wooded glen where the corpse could be found.

When Papagolas left the jail, Jacewicz and Rearick were having dinner, so he was met by another squad car. Papagolas waited until Jacewicz and Rearick returned and informed them that he had learned where the body was. The police followed his directions and, several hours later, discovered the body in a small clearing in the woods.

Papagolas did not visit Alexander again. On April 2, 1979, Alexander called him at work to ask what he had told the police. Papagolas replied that he told them what he knew. Alexander asked him not to testify against him, but Papagolas said he would, if asked to. Alexander hung up and Papagolas called Jacewicz and informed him of the conversation.

On September 17, 1979, Alexander was indicted for murdering Cook. On May 15, 1980, following a pretrial hearing, the court denied Alexander's motion to suppress Papagolas's testimony about his two confessions as violative of his rights under the fifth and sixth amendments. When Alexander renewed his motion to suppress in mid-

trial and again at the end of the evidence, the court denied the renewed motion on each occasion.

On July 2, 1980, the jury found Alexander guilty of murder and, on July 11, the court sentenced him to a term of *twenty-five years to life*. Five years later, on August 6, 1985, the Connecticut Supreme Court, Peters, *C.J.*, approved the admission of the confessions and affirmed the judgement. *State v. Alexander*, 197 Conn. 180, 496 A.2d 486 (1985). The court ruled that no custodial interrogation had occurred within the meaning of *Miranda*. Papagolas, the court held, was acting as a private citizen and not as an agent of the police because his initial decision to visit Alexander did not involve the police, as he was prompted by curiosity and personal concern for the victim, and because his contact with the police during the entire period was minimal.

On June 7, 1988, the district court adopted the recommended ruling of Magistrate Thomas Smith that Alexander's petition for habeas corpus be denied and found that Alexander had exhausted his state remedies.

II.

Alexander asserts that, after his first confession to Papagolas on March 19, the police used Papagolas as their undisclosed agent to interrogate him in jail in circumvention of his demand that counsel be present during any questioning. He maintains that, under the cumulative pressures of Papagolas's questioning in the coercive environment of the jail, he was compelled to relate where he had hidden the body. He accordingly argues that the trial court should have suppressed his second confession

because it was obtained in violation of his implicit fifth amendment privilege against self-incrimination pursuant to *Miranda*. On appeal, Alexander makes no claim that the first confession should be suppressed.

Although the fifth amendment contains no explicit reference to a right to counsel, the Court in *Miranda* fashioned rules to safeguard a defendant's privilege against self-incrimination when he is subject to "custodial interrogation," which it defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way," *Miranda*, 384 U.S. at 444. In arguing that his *Miranda* rights had been triggered when he made his second confession, therefore, Alexander must show (1) that Papagolas was an agent of the police, and (2) that the confession was elicited under official compulsion.

We first consider whether Papagolas was acting as an agent of the state when he interrogated Alexander. The prosecution asserts Papagolas's encounters with the police did not exhibit the requisite "degree of prearrangement" or "ongoing cooperation" to compel a finding of agency because Papagolas acted throughout on his own initiative, prompted by curiosity and personal concern for the victim, and was promised no benefit in return for his efforts. *Thomas v. Cox*, 708 F.2d 132, 137 (4th Cir. 1983), *cert. denied*, 464 U.S. 918.

We disagree. Although Papagolas was not a state agent on March 19 when Alexander first confessed that he killed Cook, he had become an undisclosed implied

government agent by March 22 when he elicited Alexander's second confession describing where he had concealed the corpse.

It is true that the police were not involved in Papagolas's initial decision to visit Alexander. They did not know about his first visit to the jail on March 14th, his second on the 15th, or his third on the morning of the 19th, when Alexander told him, "for [his] own peace of mind" that he had killed Cook. Officers Jacewicz and Rearick first met Papagolas by chance in a parking lot on the 14th. Although Jacewicz had made a mental note of Papagolas's name when Papagolas telephoned Alexander at home on March 9, the police had made no attempt to contact him by the time of the first confession. In discussing Cook with Alexander, Papagolas was motivated by curiosity and concern for his missing friend. The police did not have sufficient involvement in, or knowledge of, Papagolas's visits to support the claim that there was an agency relationship when Alexander first confessed to Papagolas on March 19. We agree with the Connecticut Supreme Court, and Alexander no longer disputes, that the first confession is admissible.

Following that first confession, however, the police took the initiative. They *persuaded* Papagolas to continue his visits to Alexander and advise them about what he learned. They telephoned Papagolas on March 21 to find out whether he had received a call from Mrs. Alexander. They specifically asked him to get more information from Alexander. Jacewicz and Rearick took Papagolas in their police cruiser from Rockville to the Hartford jail, a distance of approximately 20 miles, on each of his final three

visits, including that of March 22, when Papagolas elicited a description of where the body was concealed. On each occasion, Jacewicz and Rearick either waited for Papagolas outside the prison or arranged for other officers to wait for him. Each time they debriefed Papagolas on the ride back to his home. They refrained from giving him a citation for having driven without a license. We find that after Alexander's first confession on March 19, Papagolas became an undisclosed implied agent of the police for the purpose of interrogating Alexander about where he had hidden Cook's body.

We next consider whether the confession was elicited under official compulsion. The state argues that, because Alexander considered Papagolas to be his friend and because the purpose of *Miranda* is to protect a suspect only where there is an atmosphere of official coercion, he could not have felt the pressures contemplated by *Miranda*, even if Papagolas is found to be a state agent. The prosecution claims that the language of *United States v. Henry*, 447 U.S. 264, 272 (1980) – that "the Fifth Amendment has been held not to be implicated by the use of undercover Government agents before charges are filed because of the absence of the potential for compulsion" – is applicable in all cases, even those in which the allegedly "coercive" questioning takes place in jail. The state concludes that Alexander's fifth amendment right to counsel was not violated because Papagolas's questioning did not amount to custodial interrogation in an atmosphere of coercion. We disagree.

The *Miranda* safeguards apply in situations in which an incarcerated suspect is interrogated about an offense other than the one for which he is imprisoned. *See Mathis*

v. United States, 391 U.S., 1, 4 (1968). When Papagolas visited Alexander after his request for counsel, his fifth amendment rights under *Miranda* had attached even though Papagolas's questioning involved an offense other than the one for which he was incarcerated. *Arizona v. Roberson*, ___ U.S. ___, 108 S.Ct. 2093, 2099 (1988). "[T]he presumption raised by a[n] [incarcerated] suspect's request for counsel – that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance – does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation." *Id.* Thus, where a suspect is in an inherently coercive environment such as a jail or a place where his freedom is significantly restricted, the interrogation is in custodial surroundings even though the suspect believes he is speaking to a friend. *See, e.g., United States v. Brown*, 466 F.2d 493, 459 (10th Cir. 1982) *and United States v. Surridge*, 687 F.2d 250, 253 (8th Cir. 1982), *cert. denied*, 459 U.S. 1044 (1982).

The state argues, however, that Alexander's presence in jail did not itself automatically create a coercive atmosphere. In a prison context, the state contends, "coercion" is a relative concept which "implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement." Counsel cites *Cervantes v. Walker*, 589 F.2d 424, 428 (9th Cir. 1978) and *United States v. Conley*, 779 F.2d 970, 972 (4th Cir. 1985), *cert. denied*, 107 S.Ct. 114 (1986), in which questioning in prison was held to be uncoercive and therefore outside the scope of *Miranda*.

These cases are inapposite. The decisions in *Cervantes* and *Conley* both turned on the common fact that the questioning occurred in relatively uncoercive areas of the prison such as the library and the medical conference room. Moreover, unlike Papagolas's questioning, which took place over several days and focused on obtaining specific information, the questioning in *Cervantes* and *Conley* was not conducted with the express purpose of eliciting incriminating statements.

Alexander also points to several factors beyond his incarceration that increased his sense of coercion. Papagolas deliberately employed tricks to win Alexander's trust and purposefully added to his anxiety. By suggesting that he could help to prevent the discovery of the body by hastening its decomposition, Papagolas persuaded Alexander to depend on him. After having twice said that he did not wish to disclose the location of the body, Alexander finally gave in to the inherent psychological pressures of the jail environment. There are "powerful psychological inducements to reach for aid when a person is in confinement . . . [c]onfinement may bring into play subtle influences that will make [the defendant] particularly susceptible to the ploys of undercover Government agents." *United States v. Henry, supra,* at 274. The use of Papagolas by the police in a carefully orchestrated sequence of questioning designed to elicit a confession violates *Miranda's* bar against "all types of questioning and psychological ploys, calculated or reasonably likely to produce the desired result." *State v. Graham,* 186 Conn. 437, (1982).

Alexander's second confession was not a spontaneous, unsolicited statement, but a product of the pressures of Papagolas's systematic questioning in compliance with the requests of the police while Alexander was in custody and after he had demanded counsel. Alexander's implicit fifth amendment rights under *Miranda* were therefore violated.

Finally, we note that the state obviously thought that, in addition to the first confession, it would be necessary to locate Cook's body so that there could be no reasonable doubt regarding Cook's fate. The second confession, leading to the location of the body, resolved that doubt. Thus the admission of the second confession cannot be considered harmless error.

Reversed and remanded for the entry of an order releasing Alexander from custody on the murder conviction unless he is retried within a reasonable time.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WAYNE ALEXANDER,
-Petitioner

- v - CIVIL NO. H-86-123(PCD)

STATE OF CONNECTICUT,
-Respondent

MAGISTRATE'S OPINION

The petitioner, Wayne B. Alexander, was convicted of murdering Vern Alan Cook in violation of Conn. Gen. Stat. §53a-54(a). He brings this application for a writ of habeas corpus pursuant to 28 U.S.C. §2441. Alexander claims that his murder conviction was the result of a violation of his implicit Fifth Amendment right to counsel at certain allegedly "custodial interrogations." For the reasons set forth below, the petition for a writ of habeas corpus must be denied. 28 U.S.C. §636. Petitioner is free to seek timely review by an Article III judge.

FACTS

Wayne Alexander and Vern Cook were codefendants in a third degree larceny case, and were scheduled to appear in the Rockville courthouse on January 23, 1979. That very day the courthouse was seriously and mysteriously damaged by fire. As a result of the fire, the codefendants' court appearances were rescheduled for February 6, 1979. However, on February 6, 1979, Vern Cook failed to appear. After an unsuccessful search for Cook, the State Police suspected foul play.

On March 9, 1979, Alexander admitted setting fire to the courthouse and implicated Cook as his accomplice in

the arson. Tr. at 6, 57. Alexander was thereupon arrested for arson. Tr. at 6, 7. On the way to the Hartford Correctional Center for incarceration, the State Police stopped at defendant's house so he could say goodbye to his wife and child. While at his house, Alexander received a phone call from his friend, one James Papagolas. Alexander told Papagolas that he had been arrested for arson and that "the police think Cook is a body somewhere". Tr. at 89, 325. He also asked Papagolas to remove and sell the radios from his cars and to junk the cars. Tr. at 13. Finally, Alexander asked Papagolas to visit him in jail. Tr. at 15, 325. Defendant was then transported to the jail.

On March 14, 1979, Papagolas first visited Alexander at the Hartford Correctional Center. Tr. at 89, 326. Papagolas drove his own car to the jail and did not notify the State Police in advance of his visit. Tr. at 337. He later testified that his curiosity had prompted him to visit the defendant. Tr. at 103. When morning visiting hours at the jail ended, Alexander asked Papagolas to return later in the day to continue their conversation. Tr. at 327, 336. After leaving the jail, Papagolas went to a parking lot near Alexander's home in order to remove the radio from one of Alexander's cars and sell it for him. Tr. at 7, 327. While Papagolas was removing the radio, State Police Sergeant Jacewicz and Trooper Rearick happened by. They stopped because they recognized the car to be Alexander's. Tr. at 7, 86-87. This constituted the first meeting of the police and Papagolas at which there was any discussion of the whereabouts of Vern Cook. Tr. at 8, 88. At this time the troopers mentioned to Papagolas their suspicion that Cook had met with foul play. Tr. at 8, 88.

Papagolas stated that he would be going to visit Alexander shortly and that if he saw or heard anything about Cook, he would tell them. Tr. at 330.

Papagolas next had contact with the troopers on March 15, 1979, when he telephoned them regarding a conversation he had with Alexander's wife concerning firearms that Alexander may have owned. She told Papagolas that Alexander may have hidden a gun under the dashboard of his car. Tr. at 12. In response to Papagolas's call, the troopers met Papagolas on Union Street in Rockville on March 16, 1979. Papagolas told the police that while he was taking the radios out of Alexander's car he found a partially empty styrofoam box of .38 caliber bullets. Tr. at 13, 14, 91. During this encounter with Papagolas, the troopers again requested that he call them if he heard anything about Cook. Tr. at 15.

On March 17, 1979, Alexander's attorney learned that the State Police had tried to question Alexander at the jail in his absence. The attorney thereupon notified the State Police that Alexander did not wish to be questioned without his lawyer present. Tr. at 9.

Papagolas's second visit to the jail occurred on March 19, 1979, during the morning visiting hours. Tr. at 51, 334. The visit was short because Alexander's wife was also visiting. Tr. at 333, 336. Papagolas drove his own car to the Hartford Correctional Center and did not inform the State Police in advance that he was going to visit Alexander. Tr. at 120, 337. During this second visit Alexander admitted to Papagolas that he (Alexander) had killed

Vern Cook. Tr. at 104, 121, 335. More specifically, Papagolas asked defendant if he killed Vern Cook and Alexander replied, "Well, for your own peace of mind, yes, I did". Tr. at 121-122, 335. After defendant admitted killing Cook, Papagolas asked him if the body was well hidden. At first Alexander answered "yes," but he then became unsure. Tr. at 122, 124, 335. Toward the end of the visit, Alexander asked Papagolas to return that evening. Tr. at 336.

After this morning visit with defendant on March 19, 1979, Papagolas drove to Vernon, called the State Police from Howard Johnson's, and informed them that Alexander had admitted killing Cook. Tr. at 92, 337. The troopers and Papagolas then met at a delicatessen in Vernon, where Papagolas related to them the details of that morning's conversation with defendant, and stated that he was going back to the jail that evening because he was confident that Alexander would disclose where Cook's body was located. Tr. at 20, 339.

At this time the State Police still knew very little about Papagolas and were skeptical of his desire to become involved in the Cook investigation. Tr. at 16, 20-21. The police ran a routine check on Papagolas, which revealed that his driver's license was under suspension. Tr. at 30, 68, 339. Confronted with this information, Trooper Rearick and Sergeant Jacewicz offered to drive Papagolas to the jail to visit Alexander. Tr. at 68. Papagolas had asked the troopers if they would drive him to the jail, and they agreed since Papagolas's driver's license was under suspension and they wanted to corroborate the information Papagolas was relating to them. Tr.

at 30, 38, 68. Also, Papagolas had been having car trouble. Tr. at 38.

Sergeant Jacewicz and Trooper Rearick picked up Papagolas at his house the evening of March 19, 1979, and drove him, for the first time, to the Hartford Correctional Center. Tr. at 21, 68. As Papagolas testified, there was no conversation on the way to the jail except regarding the loss of Papagolas's license. Tr. at 340. During Papagolas's visit, the troopers waited for him in the parking lot. Tr. at 340. Papagolas asked Alexander about Cook's body, but obtained no additional information. Tr. at 105, 123. But, as Papagolas further testified, Alexander made arrangements with his (Alexander's) wife to call Papagolas should he desire to speak further about the location of Cook's body. Tr. at 125. Moreover, Alexander asked Papagolas to visit him the next day. Tr. at 342. On the ride home from the jail Papagolas told the police that Alexander had expressed a desire to see Papagolas again the next day. Papagolas asked the police for a ride to the jail the following day and they agreed to drive him. Tr. at 343.

The police drove Papagolas to the jail for the second time on the evening of March 20, 1979, and again waited for him in the parking lot. Tr. at 125, 51, 25, 343. During the visit Alexander expressed concern about Cook's body being found before it had sufficiently decomposed. Alexander also stated that he hoped that it would rain. Tr. at 344-346.

On the evening of March 21, 1979 Alexander's wife contacted Papagolas and told him that Alexander wanted to see him that night. Tr. at 126. Sergeant Jacewicz called

Papagolas on that evening, inquiring whether defendant had contacted him. Tr. at 126-127. Papagolas lied to Jacewicz, however, and told him he had not heard from Alexander because his (Papagolas's) wife did not want him to visit Alexander that night. Tr. at 126-127, 353, 385.

On the morning of March 22, 1979, Papagolas called the State Police and asked them to come see him. The troopers met Papagolas at his workplace, and Papagolas told them that Alexander wanted to see him. Tr. at 353. Papagolas again asked the police for a ride to the jail because he thought Alexander was going to tell him the location of Cook's body. Tr. at 127, 353. Once again the troopers drove him to the jail and waited for Papagolas in the parking lot. Tr. at 354. During this visit Alexander revealed the location of Cook's body. Tr. at 128. As a favor to Alexander, Papagolas agreed to put lime on the body, thereby preventing identification of the body as Cook's. Tr. at 128. Alexander also gave Papagolas directions to the site where Cook's body was located. After Papagolas left the jail, he led the police to a wooded area in Ashford, Connecticut, where they found the body. Tr. at 128, 131, 335-356, 359.

After Cook's body was located, Papagolas no longer visited Alexander. Tr. at 132. Eventually Alexander called Papagolas from the jail to inquire if Papagolas had told the police. Tr. at 133, 365. Defendant also said to Papagolas, "Don't go to court on this for me." Papagolas responded that he would [testify] if asked to or if subpoenaed. Tr. at 134, 366.

CONCLUSIONS

Petitioner makes no claim under the Sixth Amendment. Rather, he contends that Papagolas's questioning to him amounted to a custodial interrogation in violation of his Fifth Amendment right to counsel. Though there are "subtle distinctions between the Fifth and Sixth Amendments rights to counsel," *United States v. Gotay*, ___F.2d ___(2d Cir. 1988) Dkt. No. 87-1489, *slip op.* 2679 at 2689 (April 15, 1988), the petitioner correctly argues that *Miranda v. Arizona*, 384 U.S. 436 (1966), "established more than the need to warn; it also established . . . an implicit Fifth Amendment right to counsel at custodial interrogations." (*See* Petitioner's Memorandum at 7). Where petitioner and the court part company, however, is whether Papagolas's actions amounted to a "custodial interrogation." In the court's view they did not.

There is no dispute that Papagolas's contact with the petitioner occurred while the latter was in custody on arson charges. The court's focus, therefore, is on whether Papagolas conducted an "interrogation" in the legal sense. It is true that Papagolas *questioned* Alexander. But "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions *on the part of the police* . . . that the police should know are likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (Emphasis Added; footnotes omitted). There is no claim that Papagolas is now, or ever was, a police officer. Thus the controlling issue is whether Papagolas, a private citizen, acted as an *agent* of the police when he engaged the petitioner in conversations at the Hartford Correctional Center. While the "relationship" between Papagolas and

the police intensified somewhat as the number of Papagolas's visits to Alexander increased, the court finds that an agency relationship never quite developed.

"The point at which agency – hence proper attribution – for this purpose arises out of a government citizen relationship is not subject to any bright-line test." *Thomas v. Cox*, 708 F.2d 132, 136 (4th Cir.), *cert. denied*, 464 U.S. 918 (1983). Rather, the existence *vel non* of such an agency relationship is a question of fact. So long as there is no confusion of the discrete constitutional concerns underlying the Fourth, Fifth and Sixth Amendments, it is not logically impermissible to reason by analogy from the Fourth and Sixth Amendment cases dealing with the narrow question of agency that is raised in the instant Fifth Amendment case. This significantly broadens the base of cases which have identified criteria indicative of the existence of an "agency." Indeed, this approach was employed by the Connecticut Supreme Court in this very case.

In *State v. Alexander*, 197 Conn. 180 (1985), Chief Justice Peters wrote:

> There is no bright line test for determining when a private citizen is acting as an agent of the police. *Thomas v. Cox*, 708 F.2d 132, 136 (4th Cir.), *cert. denied*, [464] U.S. [918], 104 S.Ct. 284, 78 L.Ed.2d 262 (1983). Courts in various jurisdictions considering the question of agency, primarily in the context of a claimed right of counsel under the sixth amendment, have sought guidance from the United States Supreme Court's opinion in *United States v. Henry, supra*. In *Henry*, the court held that the

government had "deliberately elicited" incriminating statements from an incarcerated defendant in violation of his sixth amendment right to counsel when it placed a paid undercover informant in close proximity to the defendant. *United States v. Henry, supra,* 270-276. Although *Henry* did not specifically address the question of agency, the court's opinion identified some of the basic characteristics of the agency relationship. "In *Henry*, the Court considered it critical that the informant, previously in the government's paid employ in similar missions, was specifically contacted by the government and given his charge respecting the procurement of possibly incriminating information from Henry. Also important to the *Henry* Court was the fact that the informant's mission was on a 'contingent-fee' basis, *Henry*, 447 U.S. at 270, 100 S.Ct. at 2187, thereby demonstrating a formal 'prearrangement,' *Id.* at 273, 100 S.Ct. at 2188, between state and informant . . . .

From these circumstances the Court in *Henry* was able to characterize the informant as a 'Government agent expressly commissioned to secure evidence,' *Id.* at 273, 100 S.Ct at 2188, from the accused." *Thomas v. Cox, supra,* 135.

The existence of an agency relationship thus turns upon a number of factual inquiries in to the extent of police involvement with the informant. Those inquiries have promised the informant a reward for his cooperation or whether he is self-motivated; *see Thomas v. Cox, supra,* 135; *Lightbourne v. State,* 438 So. 2d 380, 386 (Fla. 1983), *cert. denied,* U.S., 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984); whether the police have asked the informant to obtain incriminating evidence and placed him in a position to receive it; *see United States v. Brown,* 466 F.2d 493, 495 (10th Cir. 1972); *People v. Odierno,* 121 Misc. 2d 330, 334, 467 N.Y.S. 2d 968 (1983); and whether the

> information is secured as part of a government initiated, preexisting plan. *See United States v. Panza*, 750 F.2d 1141, 1152 (2d Cir. 1984); *Thomas v. Cox, supra*, 136.

Id. at 183-185. The petitioner appears to have no quarrel with the authorities on which the Connecticut Supreme Court relied. Instead, he contends that Justice Peters "misread" them and "misunderstood the underlying guiding principles" (*See* Petitioner's Memorandum at 12). This magistrate respectfully disagrees.

There is a spectrum of governmental involvement. Cases falling at either end of that spectrum are easily resolved, since at one extreme police participation is extensive while at the other it is non-existent. This case falls, at *best* from petitioner's perspective, into the mid-range or "gray area." As *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981), recognizes, "The resolution of cases falling within the 'gray area' can best be resolved on a case-by-case basis consistent with the application of certain general principles." This is precisely the approach followed by the Connecticut Supreme Court (and by this magistrate in reviewing the state court record).

Specifically, Chief Justice Peters noted the following facts:

> The police did not seek out Papagolas and were not involved in his initial decision to visit the defendant. Rather, Officers John Jacewicz and John Rearick first encountered Papagolas by chance on March 14, 1979 . . .
>
> * * *
>
> Without notifying the police, Papagolas again visited the defendant on March 19, 1979. He asked the defendant whether he had killed

> Cook and the defendant answered in the affirmative. At the time he elicited this confession, Papagolas had only minimal contact with the police and it is clear that he was acting by himself and on his own initiative. The police had simply asked him to let them know if he heard anything; that request alone did not create an agency relationship.
>
> * * *
>
> The transportation service provided by the police is the strongest evidence of a possible agency relationship. In addition there was evidence indicating that, by the time of his final visit, Papagolas was motivated, at least in part, by a feeling of responsibility toward the police. There was also conflicting testimony about whether Rearick and Jacewicz ever asked Papagolas to go to the jail to get information as opposed to simply supporting his own decision to go there. Balanced against these factors, which tend to show police involvement, is the fact that the police neither initiated contact with Papagolas nor directed his activities. Papagolas had no previous affiliation with the police and was neither rewarded monetarily nor promised any favors in return for his cooperation.

Alexander, supra, 197 Conn. at 186-187 (Footnote omitted).

In addition to the facts noted by the Connecticut Supreme Court, the record establishes that Papagolas's relationship with Alexander ante-dated any contact between Papagolas and the police; hence, it cannot fairly be said that Papagolas was a police "plant" or "bait." *United States v. Pelaes,* 790 F.2d 254, 257 (2d Cir. 1986). The

record further shows that Papagolas questioned Alexander solely to satisfy his own curiosity, as Papagolas testified during the petitioner's suppression hearing:

Q. So, in other words, is it your testimony that it was solely [sic] your curiosity that prompted you to go in and keep getting information from Wayne?

A. Curiosity, and once I found out what he told me, that he killed him, then it was just a needless, senseless thing to do and I wanted him to go to jail.

(Tr. 104). Thus, like *United States v. Mitchell*, 417 F.2d 1246 (7th Cir. 1969), this is a case involving not "agency", but Alexander's "misplaced confidence" in Papagolas. *Id.* at 1249. That Papagolas felt both revulsion on learning of Alexander's barbaric act and a sense of *duty* to report to the police what he had learned is laudatory, and certainly should not be held to somehow transform Papagolas into a "police agent." *United States v. Walther, supra*, 652 F.2d at 793 ("We do not diminish the duty of any private citizen to report possible criminal activity. . . .").

As Justice Peters correctly pointed out, the "strongest evidence" that petitioner has of a "possible agency relationship" is the "transportation service" the state police provided to Papagolas. Namely, when the police learned that Papagolas was driving to the jail to visit Alexander while his (Papagolas's) license was under suspension, the police drove him. The Connecticut Supreme Court correctly concluded that, on balance and in light of the other circumstances, this still fell short of creating an "agency" relationship. Arguably, had the police *not* driven him, they might be more forcefully accused of *creating* such a

relationship by tacitly approving Papagolas's violation of motor vehicle laws. The same might be true had the police provided Papagolas with "instructions" *not* to ask certain questions – as the petitioner suggests they should have done.

Though petitioner's arguments are skillfully crafted and masterfully delivered, they assume the very thing in issue. Whether Papagolas was an agent is a question of fact. A proper resolution of that issue is not facilitated by labeling Papagolas as "an *undisclosed gratuitous implied agent*." (Petitioner's Memorandum at 14; Emphasis original). That his feelings and intentions were "undisclosed" to Alexander is simply irrelevant. That his actions vis-a-vis the state police were "gratuitous" merely means he was unpaid, which if anything, is indicative of non-agency in this context. And that this purported "agency" was an "implied" one is tantamount to a concession that the authorities never asked him to do what he did. Surely no one can seriously contend that the police were obligated to discourage Papagolas from either accepting Alexander's invitations to visit or from reporting what he had learned. In view of all the foregoing, it is not surprising that Justice Peters concluded:

> In sum, the record before us supports the trial court's conclusion that police involvement was not so extensive as to create an agency relationship between Papagolas and the police. The trial court was correct in its decision to admit the defendant's incriminating statements into evidence.

Alexander, supra, 197 Conn. at 187

For the reasons set forth above, and in part on the basis of the authorities cited in the respondent's May 3, 1988 "Supplemental Memorandum," Filing 26, the petition should be denied. The petitioner is free to seek an Article III judge's timely review of this recommendation. *See* U.S.C. § 636 and Local Rule 2 for U. S. Magistrates.

Dated at Hartford, Connecticut, this 17th day of May, 1988.

/s/ _____
THOMAS P. SMITH
UNITED STATES MAGISTRATE

STATE OF CONNECTICUT V. WAYNE B. ALEXANDER (10342)

Indictment charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Windham, and tried to the jury before Dannehy, J.; verdict and judgment of guilty, from which the defendant appealed to this court. No error.

Jean E. Blue, special assistant public defender, with whom, on the brief, was Joette Katz, public defender, for the appellant (defendant).

Susan C. Marks, special assistant state's attorney, with whom, on the brief, were Harry S. Gaucher, Jr., state's attorney, and John M. Massameno, assistant state's attorney, for the appellee (state).

PETERS, C. J. The principal issue in this case is whether a private citizen was acting as an agent of the police when he engaged the defendant in conversations in the course of which the defendant made incriminatory statements. The defendant, Wayne B. Alexander, was charged by indictment with having committed the crime of murder in violation of General Statutes § 53a-54a. A jury found the defendant guilty as charged and the trial court rendered judgment in accordance with the jury verdict. The defendant appeals from the judgment of conviction.

The jury could reasonably have found the following facts. The victim, Vern Alan Cook, and the defendant were scheduled to appear in court at Rockville in January of 1979 to answer to criminal charges of larceny in the third degree. In the early morning of the date on which

they were to appear, the courthouse was seriously damaged by fire, and their court appearances were continued to February 6, 1979. On February 5, 1979, the victim made arrangements with his mother for a ride to court on the following day, but he failed to meet his mother as planned, and never appeared in court.

The defendant admitted to police, on March 9, 1979, that he had set the Rockville courthouse fire and he implicated the victim as his accomplice in the arson. As a consequence of these admissions, he was arrested and incarcerated at the Hartford correctional center. At his own request, he was there visited on several occasions by James Papagolas, who had befriended both the defendant and the victim. On March 19, 1979, the defendant acknowledged to Papagolas that he had killed the victim. Papagolas immediately informed the police about his conversation with the defendant. In part because Papagolas' driver's license had been suspended and his car was out of order, the police thereafter drove Papagolas to the correctional center whenever he paid further visits to the defendant. On March 29, 1979, the defendant told Papagolas where the victim's body had been buried. Papagolas led the police to the wooded area that the defendant had described, where they found the body.

The defendant raises two issues in his appeal from his conviction for murder. He claims that the trial court erred: (1) in refusing to suppress the testimony of James Papagolas concerning the incriminatory statements made to him by the defendant; (2) in refusing to dismiss the grand jury indictment against him.

I

In the defendant's challenge to the admissibility of testimony concerning his incriminating statements, the defendant relies upon his constitutional rights under the fifth and sixth amendments to the United States constitution. He maintains that he was unconstitutionally interrogated in violation of his privilege against self-incrimination under the fifth amendment because he did not receive the warnings mandated by *Miranda v. Arizona*, 384 U.S. 436, 478-79, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), before he made the statements to Papagolas. Alternatively, he argues that he was unconstitutionally interrogated under the sixth amendment because his conversations with Papagolas took place in the absence of his counsel, in contravention of the rule of *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).[1] As the defendant concedes, however, a necessary predicate to both constitutional claims is a determination that the incriminating statements to Papagolas that the defendant seeks to suppress were in fact elicited from the defendant as a result of interrogation by Papagolas acting

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[1] Although in the trial court the defendant adverted to his rights under the Connecticut constitution as well as to his rights under the United States constitution, he has not on this appeal proffered any argument that the rights afforded to him by the federal and state constitution are in any way distinguishable. In the absence of such an argument, in our discussion of the constitutional claims raised herein we will, in the circumstances of this case, deem the defendant's rights under the state constitution to be coextensive with his rights under the federal constitution.

as a police officer or as an agent of the police. *See United States v. Henry*, 447 U.S. 264, 269-70, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980) (sixth amendment); *State v. Zeko*, 176 Conn. 421, 424, 407 A.2d 1022 (1979) (fifth amendment).[2] In order to prevail on these claims, therefore, the defendant must persuade us that the trial court erred in its conclusion, after a suppression hearing,[3] that "[t]he incriminating statements challenged were made by the defendant to a private citizen, not a 'police agent or informer.'" We are unpersuaded and accordingly find no error.

There is no bright line test for determining when a private citizen is acting as an agent of the police. *Thomas v. Cox*, 708 F.2d 132, 136 (4th Cir.), *cert. denied*, U.S. , 104 S.Ct. 284, 78 L.Ed.2d 262 (1983). Courts in various jurisdictions considering the question of agency, primarily in the context of a claimed right of counsel under the sixth amendment, have sought guidance from the United States Supreme Court's opinion in *United States v. Henry*,

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[2] Our disposition of this threshold issue obviates the necessity of considering other possible impediments to the defendant's constitutional claims under either the fifth amendment; *see United States v. Henry*, 447 U.S. 264, 272, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); *State v. Vollhardt*, 157 Conn. 25, 36-37, 244 A.2d 601 (1968). *State v. McDonald*, 387 So.2d 1116, 1120 (La. 1980); or the sixth amendment; *see State v. Biller*, 190 Conn. 594, 615-16, 462 A.2d 987 (1983).

[3] At trial, before Papagolas took the stand, the court reconsidered and again denied the defendant's motion to suppress. The defendant subsequently made motions to strike Papagolas' testimony, and for a mistrial, both of which the court denied.

supra. In *Henry*, the court held that the government had "deliberately elicited" incriminating statements from an incarcerated defendant in violation of his sixth amendment right of counsel when it placed a paid undercover informant in close proximity to the defendant. *United States v. Henry, supra*, 270, 276. Although *Henry* did not specifically address the question of agency, the court's opinion identified some of the basic characteristics of the agency relationship. "In *Henry*, the Court considered it critical that the informant, previously in the government's paid employ in similar missions, was specifically contacted by the government and given his charge respecting the procurement of possibly incriminating information from Henry. Also important to the *Henry* Court was the fact that the informant's mission was on a 'contingent-fee' basis, *Henry*, 447 U.S. at 270, 100 S.Ct. at 2187, thereby demonstrating a formal 'prearrangement,' *Id.* at 273, 100 S.Ct. at 2188, between state and informant . . . . From these circumstances the Court in *Henry* was able to characterize the informant as a 'Government agent expressly commissioned to secure evidence,' *Id.* at 273, 100 S.Ct. at 2188, from the accused." *Thomas v. Cox, supra*, 135.

The existence of an agency relationship thus turns upon a number of factual inquiries into the extent of police involvement with the informant. Those inquiries include the following: whether the police have promised the informant a reward for his cooperation or whether he is self-motivated; *see Thomas v. Cox, supra*, 135; *Lightbourne v. State*, 438 So.2d 380, 386 (Fla. 1983), *cert. denied*, U.S., 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984); whether the police

have asked the informant to obtain incriminating evidence and placed him in a position to receive it; *see United States v. Brown*, 466 F.2d 493, 495 (10th Cir. 1972); *People v. Odierno*, 121 Misc. 2d 330, 334, 467 N.Y.S.2d 968 (1983); and whether the information is secured as part of a government initiated, pre-existing plan. *See United States v. Panza*, 750 F.2d 1141, 1152 (2d Cir. 1984); *Thomas v. Cox*, *supra*, 136.

The issue of agency, even in a constitutional context, is primarily a question of fact; *see Thomas v. Cox*, *supra*, 135; *State v. Brooks*, Wash. App. 256, 261-62, 684 P.2d 1371 (1984); cf. *State v. Ostroski*, 186 Conn. 287, 292, 440 A.2d 984, *cert. denied*, 459 U.S. 878, 103 S.Ct. 173, 74 L.Ed.2d 142 (1982); and ordinarily we defer to factual findings made by the trial court. When, however, a defendant raises a question of this nature that is vitally affected by trial court factfinding, in a setting in which the credibility of the witnesses is not the primary issue, our customary deference to the trial court is tempered "by the necessity for a scrupulous examination of the record to ascertain whether such a factual finding is supported by substantial evidence. *State v. Frazier*, [185 Conn. 211, 219, 440 A.2d 916 (1981), *cert. denied*, 458 U.S. 1112, 102 S.Ct. 3496, 73 L.Ed.1375 (1982)]." *State v. Harris*, 188 Conn. 574, 580, 452 A.2d 634 (1982), *cert. denied*, 460 U.S. 1089, 103 S.Ct. 1785, 76 L.Ed.2d 354 (1983); cf. *State v. Ostroski*, *supra*, 291-92.

Examination of the record before us in this case reveals that there was substantial evidence for the trial court's conclusion that Papagolas was not acting as an agent of the state in his conversations with the defendant. Although the police may have supported and even

encouraged Papagolas' efforts to obtain information from the defendant, their involvement was not so extensive as to create an agency relationship.

The police did not seek out Papagolas and were not involved in his initial decision to visit the defendant. Rather, Officers John Jacewicz and John Rearick first encountered Papagolas by chance on March 14, 1979, as he was cleaning out the defendant's car. Papagolas informed the police that he was visiting the defendant at the defendant's request, had seen the defendant earlier that day and would be visiting him again. The three discussed the disappearance of Vern Cook and Papagolas agreed to contact the police if he heard anything about the victim. A similar conversation occurred at a meeting arranged by Papagolas on March 16, 1979. Without notifying the police, Papagolas again visited the defendant on March 19, 1979. He asked the defendant whether he had killed Cook and the defendant answered in the affirmative. At the time he elicited this confession, Papagolas had only minimal contact with the police and it is clear that he was acting by himself and on his own initiative. The police had simply asked him to let them know if he heard anything; that request alone did not create an agency relationship. *See Thomas v. Cox, supra,* 137.

Following the confession, police involvement increased. After Papagolas left the jail, he called Jacewicz, told him what he had learned, and arranged a meeting. He also told the police that, at the defendant's request, he was planning to return to the jail for a visit later that day. The police, who had discovered that Papagolas did not have a driver's license, agreed to drive Papagolas to the jail. Rearick and Jacewicz transported Papagolas to the

jail that evening and on two subsequent occasions. On each occasion the police waited for Papagolas outside the jail and, on the ride home, he told them what he had learned. His final visit occurred on March 22, 1979, when the defendant revealed the location of the body.

The transportation service provided by the police is the strongest evidence of a possible agency relationship. In addition there was evidence indicating that, by the time of his final visit, Papagolas was motivated, at least in part, by a feeling of responsibility toward the police. There was also conflicting testimony about whether Rearick and Jacewicz ever asked Papagolas to go to the jail to get information as opposed to simply supporting his own decision to go there. Balanced against these factors, which tend to show police involvement, is the fact that the police neither initiated contact with Papagolas nor directed his activities. Papagolas had no previous affiliation with the police and was neither rewarded monetarily nor promised any favors in return for his cooperation.[4]

In sum, the record before us supports the trial court's conclusion that police involvement was not so extensive as to create an agency relationship between Papagolas and the police. The trial court was correct in its decision

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[4] The defendant claims that Papagolas cooperated with the police because he hoped to be rewarded in a variety of ways, including not being fined for driving without a license, obtaining a recommendation to the Florida state police, and receiving a film projector. He points to no evidence, however, indicating that the police offered Papagolas any of these rewards in exchange for obtaining incriminating evidence from the defendant.

to admit the defendant's incriminating statements into evidence.

II.

The defendant challenges the validity of the grand jury indictment against him on two grounds: (1) the defendant's involuntary absence from the grand jury proceedings, and (2) the state's attorney's submission, to the grand jury, of a list of potential witnesses and their anticipated testimony. It is undisputed that the defendant, then incarcerated in connection with the pending arson charges, received no notice of the grand jury proceedings and was totally excluded from participating therein. It is equally uncontested that the state was permitted to present to the grand jury a list of witnesses that included detailed information about the connection of each potential witness with the crime. In the trial court, the defendant's unsuccessful motion to dismiss the indictment relied on these facts to raise constitutional claims of due process and of the right to confrontation. In this court, the defendant claims instead that the nature of the grand jury proceedings in this case violated the express and the implied requirements of the Practice Book. We find no error.

The state argues that the defendant's challenge to the grand jury proceedings is not properly before this court. We agree. The constitutional claims that the defendant raised at trial have not been briefed here, and are therefore deemed to have been abandoned. No other claims having been distinctly presented to the trial court, the

defendant's present arguments will ordinarily not be considered on appeal unless they fall within the narrow exception of *State v. Evans*, 165 Conn. 61, 70, 327 A.2d 576 (1973). Under *Evans*, newly raised claims that do not implicate newly discovered constitutional rights are entitled to appellate review only "where the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial." *Id.* The defendant's complaints about the grand jury proceedings that led to his indictment cannot meet this threshold test. *See State v. Torrence*, 196 Conn. 430, 435, A.2d (1985).

The defendant's claim of error with regard to his exclusion from the grand jury proceedings turns on Practice Book § 609 (4), which, at the time of those proceedings, allowed a defendant to be present while a grand jury heard evidence "within the discretion of the judicial authority."[5] The present record does not demonstrate in what manner any judicial authority exercised the discretion contemplated by this provision of the Practice Book. In the absence of such a record, the defendant cannot show the deprivation of a fundamental constitutional right. *See State v. Couture*, 194 Conn. 530, 554, 482 A.2d 300 (1984), *cert. denied*, U.S. , 105 S.Ct. 967, 83 L.Ed. 2d 971 (1985).

The defendant's claim of error with regard to the state's allegedly over-intrusive witness list is claimed to violate the accepted grand jury practice forbidding the state's attorney to question witnesses before the grand

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[5] Practice Book § 609 was repealed as of October 1, 1984.

jury. *State v. Stepney*, 181 Conn. 268, 273, 435 A.2d 701 (1980), *cert. denied*, 449 U.S. 1077, 101 S.Ct. 856, 66 L.Ed. 2d 799 (1981); *State v. Menillo*, 159 Conn. 264, 274, 268 A.2d 667 (1970). The record before us fails, however, to establish how the use of such a list interfered with the independence of the grand jury. Cf. *State v. Couture, supra*, 555 n.11.

There is no error.

In the opinion the other judges concurred.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, 10007

(212) 791-0103

ELAINE B. GOLDSMITH
Clerk

May 26, 1989

GARY D. WEINBERGER
Assistant Fed Public Defender
450 Main Street, Room 710
Hartford, CT 06103

RE: ALEXANDER V
STATE OF CONN

Docket No: 88-2318

Gentlemen:

The court has rendered a decision in the above-entitled case. The decision of the district court has been

REVERSED and REMANDED.

A copy of the opinion will be mailed to you. Additional copies of the opinion may be obtained from this office in accordance with §0.17(7) of the rules of this court supplementing the Federal Rules of Appellate Procedure.

Judgment has been entered today and a mandate will issue only to the District Court in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Your attention is directed to the provision of Rule 39 of the Federal Rules of Appellate Procedure requiring the itemized and verified bill of costs, if any, to be filed with proof of service, within 14 days after entry of judgment.

Very truly yours,

ELAINE B. GOLDSMITH,
Clerk by /s/ RONALD SEANN
Deputy Clerk

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of June 1989.

Present: HON. J. EDWARD LUMBARD,
HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. FRANK X. ALTIMARI,

Circuit judges,

WAYNE B. ALEXANDER,
Petitioner-Appellant,
v 88-2318
STATE OF CONNECTICUT,
Respondent-Appellee.

A petition for rehearing having been filed herein by Respondent-Appellee, State of Connecticut. Upon consideration thereof, it is ORDERED that said petition be and it hereby is DENIED.

/s/ Elaine B. Goldsmith
Clerk

NO. CR 11-36620-7872
STATE OF CONNECTICUT
SUPERIOR COURT
VS.
JUDICIAL DISTRICT OF WINDHAM
WAYNE B. ALEXANDER MAY 15, 1980

MEMORANDUM OF DECISION

The issue, on this motion to suppress is, whether incriminating statements and information given by the defendant before indictment should be excluded at his upcoming trial as violative of his rights to assistance of counsel and to freedom from testimonial compulsion. It is the defendant's contention that the resolution of this issue depends on the application of the rule established in *Massiah v. United States*, 12 L Ed 2d 246, holding that a defendant's incriminating statements, obtained under the circumstances there disclosed, could not constitutionally be used by the prosecution as evidence against the defendant at his trial. The holding in Massiah is founded in the highest justice and wisdom, while, in applying it to cases, as they arise, there are distinctions and circumstances, that must be observed, as essentially belonging to the principle itself.

Nothing can be more obvious, than that, decisions which deal with post-indictment questioning of a defendant are wholly inapposite, see *Massiah*, supra; and that, if there were no interrogation, there would be no constitutional violation and no ground for exclusion.

Now, if this were all, if the incriminating statements were induced by sovereign authority, if there were questioning or deception by governmental agencies, the

defendant might rightly insist upon having the evidence excluded, but there is much more than that here. There is a controlling circumstance, bearing solely upon the claimed impingement on the fundamentals of the constitutional protection sought to be invoked. As the testimony in the evidentiary inquiry made plain, at all the crucial times the police were simply interested in determining the whereabouts and, perhaps, the fate of Vern Allen [sic] Cook. The incriminating statements challenged were made by the defendant to a private citizen, not a "police agent or informer", and were in the nature of request for assistance to conceal his guilt.

Here, the police were engaged in an investigation to determine the whereabouts of Vern Allen Cook and the person in whom the defendant confided was not a "police agent or informer" but a private citizen; and, everything occurred prior to indictment.

Under the circumstances here disclosed, where there is no question whatever as to the voluntariness of the defendant's statements, made for his own benefit and prompted by his concern for himself, it was entirely proper to continue an investigation into the whereabouts of Vern Allen [sic] Cook and the defendant's own incriminating statements may be constitutionally used by the prosecution as evidence against him at his trial.

The motion to suppress is denied.

/s/ ,J.
Dannehy, J.

Supreme Court, U.S.
FILED
OCT 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-510

In The

SUPREME COURT OF THE UNITED STATES

October Term 1989

LARRY R. MEACHUM, COMMISSIONER,
CONNECTICUT DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

WAYNE B. ALEXANDER,
Respondent.

-v-

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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No. 89-510

In The

SUPREME COURT OF THE UNITED STATES

October Term 1989

LARRY R. MEACHUM, COMMISSIONER,
CONNECTICUT DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

WAYNE B. ALEXANDER, Respondent

-v-

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Whether the Second Circuit Court of Appeals erred in ruling that the Connecticut State Police used James Papagolas as their agent to interrogate Wayne Alexander in custody in circumvention of his demand that counsel be present during questioning and thereby violated his Fifth Amendment rights as explicated in Miranda and its progeny.

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LIST OF PARTIES

Wayne Alexander is the Respondent in this action. Throughout the pendency of this case until this juncture his party-opponent has been designated the "State of Connecticut." Larry R. Meachum, Commissioner of the Connecticut Department of Corrections, has undertaken to petition this Court for a Writ of Certiorari on behalf of the State of Connecticut and hence is denominated the Petitioner in this action. For ease of reference, Mr. Alexander will simply refer in his response to the Certiorari Petition to "Connecticut" to indicate the Petitioner.

OPINIONS BELOW

Wayne Alexander agrees with Connecticut's recitation of the opinions below and as set forth in the Appendix to Connecticut's Certiorari Petition.

JURISDICTION

Wayne Alexander agrees with Connecticut's statement of jurisdiction.

STATEMENT OF THE CASE

A. Case History Statement

On September 17, 1979, Wayne Alexander was indicted by a Connecticut grand jury for the crime of murder. The indictment alleged that on or about the 6th day of February, 1979, Wayne Alexander intentionally caused the death of Vern Alan Cook, in violation of Conn. Gen. Stat. § 53a-54a. Wayne Alexander pleaded not guilty and elected to be tried by a jury.

On May 15, 1980, the Honorable Joseph F. Dannehy of the Connecticut Superior Court denied Wayne Alexander's Motion to Suppress alleged jailhouse confessions made to James Papagolas following an evidentiary hearing.

Wayne Alexander was tried before a jury. The prosecution's principal witness was James Papagolas. On July 2, 1980, the jury returned a verdict of guilty of murder. On July 11, 1980, the court sentenced Wayne Alexander to a term of imprisonment of twenty-five years to life. From that judgment, rendered on the jury's verdict, Wayne Alexander appealed. Included in said appeal was Judge Dannehy's ruling on the admissibility of alleged confessions.

The Connecticut Supreme Court decided the appeal in a decision published at 197 Conn. 180 and 496 A.2d 486 on August

6, 1985. A copy of that decision is annexed to Connecticut's Certiorari Petition as Appendix A. The issues relating to the methods used to obtain alleged confessions from Wayne Alexander by James Papagolas were resolved adversely to him.

Wayne Alexander then filed a federal petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254, claiming that (1) his implicit Fifth Amendment right to counsel (2) was violated by the Connecticut State Police through their use of James Papagolas to elicit incriminating statements from him. The petition was docketed to the Honorable Peter C. Dorsey, United States District Judge for the District of Connecticut. Judge Dorsey referred the matter to United States Magistrate Thomas P. Smith for a recommended ruling. The Office of the Federal Public Defender for the District of Connecticut was appointed under the Criminal Justice Act to represent Mr. Alexander.

Magistrate Smith heard oral argument on April 12, 1988. Counsel for the State of Connecticut conceded at that oral argument that although the Connecticut Supreme Court construed the evidence, it made no findings of fact relative to the suppression hearing. Put differently, Connecticut conceded that the Magistrate should engage in an independent non-deferential plenary review of the record of the suppression hearing. Magistrate Smith, thereafter, recommended to Judge Dorsey that he find that Mr. Alexander had an implicit Fifth Amendment right

to counsel but that it was not violated because, in his view, James Papagolas never became an agent or instrumentality of the State police. A copy of the Magistrate's recommended ruling is annexed to Connecticut's Certiorari Petition. Wayne Alexander objected. Judge Dorsey adopted the Magistrate's recommended ruling with the modification that Mr. Alexander was found to have exhausted his state remedies. Mr. Alexander thereafter requested and obtained a Certificate of Probable Cause to appeal pursuant to 28 U.S.C. § 2253 and Federal Rule of Appellate Procedure 22(b), from Judge Dorsey's ruling.

Wayne Alexander, through the Office of the Federal Public Defender for the District of Connecticut, filed a timely appeal of Judge Dorsey's ruling in the Second Circuit Court of Appeals. The Second Circuit (Lumbard, Van Graafeiland and Altimari, Circuit Judges) heard oral argument on November 10, 1988, and rendered an opinion on May 5, 1989. Said opinion is officially reported at 876 F.2d 277 and a copy is annexed as Appendix A to Connecticut's Certiorari Petition. In that opinion, the panel unanimously reversed the judgment of the District Court and remanded, "for entry of an order granting the writ and the release of Alexander on the murder charge, unless he is retried within a reasonable time."

The State of Connecticut filed a petition for rehearing with the Second Circuit Court of Appeals but not a suggestion

for rehearing en banc. The panel denied the petition for rehearing by an order entered June 28, 1989. The State of Connecticut thereafter filed a Petition for a Writ of Certiorari with this Court seeking review of the judgment and opinion of the Second Circuit Court of Appeals.

B. Statement of Facts

Wayne Alexander is in substantial agreement with the facts as stated by the Second Circuit Court of Appeals as reported at 876 F.2d 277 and at pages A-1 to A-15 of Connecticut's Certiorari Petition. The following summary reflects in chronological order the pertinent events of this case.

Chronology

1.

(3/9/79) State Police confront Wayne Alexander regarding Vern Cook. Wayne Alexander admits committing arson with Vern Cook but denies killing him. State Police arrest Wayne Alexander for arson and take him to jail. En route to jail, State Police learn that Wayne Alexander and Vern Cook have a mutual friend in James Papagolas.

2.

(3/14/79) State Police visit James Papagolas. They tell James Papagolas that Vern Cook is believed dead, and they and they ask James Papagolas if he plans on visiting Wayne Alexander in jail. James Papagolas says yes

and tells them that he will let them know if he learns anything about Vern Cook.

3.

(3/15/79) James Papagolas calls the State Police to report that Wayne Alexander's wife told him that Wayne Alexander might have a gun in his car.

4.

(3/16/79) State Police meet James Papagolas, who tells them that he found .38 caliber bullets in Wayne Alexander's car.

5.

(3/17/79) Wayne Alexander's attorney, having learned that the State Police had been to the jail in an effort to question him further, calls the State Police to notify them formally that Mr. Alexander does not want to talk with them in the absence of counsel.

6.

(3/19/79) James Papagolas visits Wayne Alexander in jail. He drives his own car; he does not notify the State Police in advance of his visit. He asks "for my own peace of mind" if Wayne Alexander killed Vern Cook and Wayne Alexander says yes.

7.

(3/19/79) (cont'd) After Wayne Alexander admits killing Vern Cook, visiting time ends and Wayne Alexander asks James Papagolas to return. James Papagolas calls and meets with the State Police. He describes his morning visit in detail and tells the officers that he is confident that he can get Wayne Alexander to reveal the location of Vern Cook's body. The State Police thereupon drive James Papagolas back to the jail for that purpose. James Papagolas "pumps" Wayne Alexander but to no avail. On the return ride, James Papagolas describes his efforts and their lack of success to the State Police.

8.

(3/20/79) The State Police drive James Papagolas back to the jail and wait while he visits Wayne Alexander. James Papagolas reports back, on the return ride, that he offered to put lime on Vern Cook's body as a ruse to learn its location but Wayne Alexander did not take the bait.

9.

(3/21/79) James Papagolas receives word that Wayne Alexander wants to see him.

10.

(3/22/79) James Papagolas calls the State Police, who drive him to the jail and wait while he visits Wayne Alexander. When James Papagolas returns, he informs the waiting officers that he has finally inveigled the location of Vern Cook's body and leads them to it.

ARGUMENT

A. The Issue Presented In This Case Is Fact-Bound And Not Worthy of This Court's Review

Connecticut asserts that in this case the Second Circuit Court of Appeals has decided an important question of law which has not been, but should be, settled by this Court. Wayne Alexander respectfully disagrees because the Second Circuit Court of Appeals did not announce new law but rather applied established legal principles to the particular facts of this case.

Connecticut's position with the Second Circuit Court of Appeals was limited to the assertion that Wayne Alexander was

not "interrogated" by the "police". Connecticut never challenged the proposition that if Wayne Alexander was "interrogated" by the "police" such would have violated his Fifth Amendment rights. Thus, the inquiry by the Second Circuit Court of Appeals was whether the police used James Papagolas as their agent or instrumentality to interrogate Wayne Alexander in custody in circumvention of his demand that counsel be present during questioning.[1]

According to generally accepted principles of law that are not contested in this case, two critical factors in the "instrument or agent" analysis are: (1) the extent of knowledge and acquiescence by the police and (2) the intent of the private

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[1] Connecticut conceded at oral argument before the Magistrate that the Connecticut Supreme Court made no findings of "fact", as that term is defined in Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963), that would act under 28 U.S.C. §2254(d) to preclude independent non-deferential plenary federal review. The Magistrate conducted such a review of the record and recommended a ruling that was adopted by the District Court Judge. Connecticut argued on appeal to the Second Circuit that case law founded on Federal Rule of Civil Procedure 52 created a clearly erroneous standard of review of the District Court's decision. That position was presumably rejected because the District Court conducted no evidentiary hearings. Connecticut for the first time sought to invoke 28 U.S.C. §2254(d) in its Petition For Rehearing, which was summarily denied. Connecticut now seeks to complain to this Court with the appearance of earnest dismay that the decision of the Second Circuit, "provided no explanation of why... 28 U.S.C. §2254 should not apply...." The answer, had the question been properly preserved and presented, would be that no presumption of correctness attaches to State Court findings that involve mixed questions of law and fact. Cuyler v. Sullivan, 446 U.S. 335 (1980).

party. James Papagolas testified as follows at the suppression hearing:

> Q So, in other words, it is your testimony that it was soley [sic] your curiosity that prompted you to go in and keep getting information from Wayne?
>
> A Curiosity, and once I found out what he told me, that he killed him, then it was just a needless, senseless thing to do and I wanted him to go to jail.
>
> * * *
>
> Q All right. Now once Wayne had told you that he had killed Vern Cook what was your attitude?
>
> A I was no longer interested in him being my friend then. . . . He stopped being my friend from then, and from then on I was soley [sic] interested in him doing his time for that.

That testimony dovetailed into his other testimony:

> Q Did Sergeant Jaciewicz, in fact, ask you to go back to the jail and get more information from Wayne Alexander?
>
> A Yes, he did.
>
> Q He didn't say to you if you are going back and get any more information will you notify us. He specifically asked you?
>
> A He also said that at times too.
>
> Q But at that time he specifically asked you to go back to the jail and get information from Mr. Alexander, is that correct?
>
> A Would I go back and get more, yes, right.

The Second Circuit Court of Appeals considered that testimony, in the context of the other facts of this case and in light of

standard legal principles not challenged by Connecticut, in the course of deciding that, by the time James Papagolas inveigled the location of Vern Cook's body, there was an adequate basis to find the existence of an implied agency relationship between James Papagolas and the police. No new law was created or announced in the process of reaching that fact-based conclusion.

B. The Decision of The Second Circuit Court of Appeals In This Case Is Not in Conflict With Any Other Circuit Court of Appeals

Connecticut does not seek a review on writ of certiorari by this Court based on any assertion that the decision of the Second Circuit Court of Appeals in this case is in conflict with any other decision by another federal court of appeals. In point of fact, the Second Circuit has previously held, in United States v. Willoughby, 860 F.2d 15 (1988), that questioning of an inmate by an undisclosed police agent does not constitute per se custodial interrogation for Miranda purposes; that the questioning must occur in an atmosphere of coercion in order to constitute custodial interrogation. Consistent with Willoughby, the Second Circuit in the case at bar found, based on the particular facts of this case, that a coercive atmosphere existed when James Papagolas questioned Wayne Alexander regarding the location of Vern Cook's body. Connecticut's

Petition For Rehearing to the Second Circuit made no claim that the decision in the case at bar conflicts with Willoughby. Moreover, Connecticut never suggested en banc review to the Second Circuit to resolve any purported conflict between Willoughby and this case. Such a contention would have been unavailing because the dispute in this case was not over controlling legal principles but rather the application of well-settled law to the particular facts of this case.

C. The Second Circuit's Decision Is Not Based On The Law As Found in Illinois v. Perkins

This Court has accepted certiorari review in Illinois v. Perkins, No. 88-1972, to review a decision by the Appellate Court of Illinois that an incarcerated suspect is per se subjected to "custodial interrogation" whenever he is questioned by an undisclosed police agent, even in the absence of coercion beyond the mere fact of his confinement. That issue is not present in this case because of the standard applied by the Second Circuit Court of Appeals in the case at bar. As previously mentioned, in this case the Court explicity found, based on the facts of this case, that there were coercive circumstances beyond the mere fact of incarceration. See, e.g., 876 F.2d at 283 ("Alexander also points to several factors

beyond his incarceration that increased his sense of coercion."). This Court granted certiorari in Perkins to determine which standard is correct. Even if this Court determines that the Second Circuit standard is too high because the Illinois per se standard is correct, application of the Illinois per se standard would result in the same ruling by the Court.

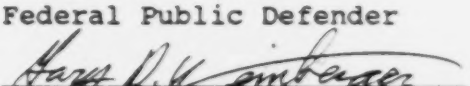
CONCLUSION

The decision of the Second Circuit Court of Appeals that the Connecticut State Police used James Papagolas as their agent to interrogate Wayne Alexander in custody in circumvention of his demand that counsel be present during questioning and thereby violated his Fifth Amendment Rights as explicated in Miranda and its progeny is a fact-bound determination that is not in conflict with any other Circuit Court of Appeals and represents the application of a legal standard that, if anything, was higher than necessary to be consistent with the Constitution as previously interpreted by this Court. Wherefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Thomas G. Dennis
Federal Public Defender

Dated: October 26, 1989

By 
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Supreme Court, U.S.
FILED
OCT 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-510

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

LARRY R. MEACHUM, COMMISSIONER,
CONNECTICUT DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

WAYNE B. ALEXANDER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF AMICI CURIAE OF THE STATE OF SOUTH DAKOTA, ET AL.*

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment requires suppression of a jailhouse statement made by a prisoner to his friend where: (1) the friend voluntarily informs police, on a continuing basis, of the information confided to him by the prisoner; (2) the friend requests and receives police transportation to and from the prison; and (3) the information pertains to murder, an offense which was uncharged at the time the statement was made.

2. Whether a judgment of the Court of Appeals must be vacated where, without applying the presumption of correctness mandated by 28 U.S.C. § 2254(d) and without complying with the dictates of Sumner v. Mata, 449 U.S. 531 (1981), the Court of Appeals relied upon its own findings of fact, which are contrary to those of a state trial court and state supreme court and are unsupported by the record.

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v.

WAYNE B. ALEXANDER,

Respondent.

The Amici States, identified in Appendix A, hereby pray that the Court issue a Writ of Certiorari to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled case.

INTEREST OF AMICI CURIAE

The State of South Dakota submits this brief as amicus curiae in support of the Petition for Writ of Certiorari filed by the State of Connecticut. Connecticut seeks

review of the decision of the Second Circuit Court of Appeals in Alexander v. State of Connecticut, 876 F.2d 277 (2nd Cir. 1989). Connecticut approves South Dakota's submission of this brief as amicus curiae.

Availability and use of informants in criminal investigations and convictions is becoming increasingly common. Such informant testimony at trial often is challenged on the basis of an entangling relationship between the informant and law enforcement authorities. If that entanglement constitutes an agency relationship, the informant may have violated the defendant's Fifth Amendment rights if the informant did not administer the warning required by Miranda v. Arizona, 384 U.S. 436 (1965). Such Miranda-based challenges are becoming much more common. For example, South Dakota faces the issue in a habeas corpus proceeding in federal court and awaits a decision on a corollary issue in

the state supreme court. Clear guidance on this issue is necessary to law enforcement authorities and courts.

In addition, 28 U.S.C. § 2254(d) requires that federal courts considering habeas corpus petitions presume correctness of state court factual findings, except where certain limited circumstances exist. All of the states are called upon tc defend against applications for writs of habeas corpus in federal courts. These applications for writs issue after the highest state courts have already rejected the grounds for release presented by the petitioner. In many cases, the state courts have made factual findings, which this Court and the Congress have indicated should be given great deference. Since the Second Circuit in this case refused to give such deference to the Connecticut Supreme Court, the Amici States request that the petition be granted.

SUMMARY OF ARGUMENTS

The Second Circuit has held that an informant elicited information from Respondent in such a manner and under such circumstances that an agency relationship was formed with law enforcement, thus violating Respondent's Fifth Amendment rights in the absence of a warning as required under Miranda v. Arizona, 384 U.S. 436 (1965), and given by the informant. Other circuits have held that an agency relationship was not established under similar circumstances. Based on the majority rule in federal appeals courts, an agency relationship is not formed between law enforcement personnel and an informant if the informant is not compensated, if the informant acts independently and voluntarily or if the informant is self-motivated. No "bright line" of authority from this Court exists for such a "non-agency" conclusion, however.

Since the decision in this case conflicts with the decisions of other federal courts of appeals, and since the lower courts and law enforcement officers require guidance on the issue, the Writ should be granted.

In reaching its conclusion that agency existed, the Second Circuit rejected factual findings of the Connecticut Supreme Court. The Amici States contend that it was improper for the Second Circuit to do so under 28 U.S.C. § 2254(d) and Sumner v. Mata, 449 U.S. 539, 551 (1981). Sumner requires that a federal court, before rejecting state court findings of fact, set forth its reasons. The Second Circuit did not do so in this case. The Amici States contend that the ultimate finding of non-agency was subject to deference under § 2254(d). Even if this is not the case, however, this Court's cases require that deference be given to subsidiary findings of historical fact made by the

Connecticut Supreme Court. Because the Second Circuit made no mention of § 2254(d) in making its ruling, it failed to give deference to the state court. Its decision therefore conflicts with the decisions of other courts of appeals and with Sumner v. Mata, itself. For this reason, this Court should grant the writ and reverse the decision of the Court of Appeals of the Second Circuit.

ARGUMENTS

I

THE SECOND CIRCUIT COURT OF APPEALS BROUGHT ITSELF INTO CONFLICT WITH OTHER CIRCUIT COURTS OF APPEALS WHEN IT HELD THAT AN INFORMANT WHO IS COOPERATING WITH LAW ENFORCEMENT AUTHORITIES MUST ISSUE MIRANDA WARNINGS TO A DEFENDANT, EVEN THOUGH THE INFORMANT ACTS INDEPENDENTLY AND VOLUNTARILY, ACTS WITHOUT COMPENSATION AND IS SELF-MOTIVATED.[1]

---

[1]In order for the Second Circuit to find
(Footnote Continued)

A significant aspect of the respective holdings of the Supreme Court of Connecticut and the Second Circuit Court of Appeals turns on the alleged agency relationship between Papagolas and law enforcement personnel. From the outset, Alexander has maintained that his conversations with Papagolas amounted to interrogation by police and, therefore, he was deprived of his Fifth Amendment rights when Papagolas' testimony was admitted at trial. Prior to examining that constitutional issue, the Supreme Court of Connecticut correctly observed that study of such an issue first required inquiry into any potential agency relationship

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(Footnote Continued)
a Fifth Amendment violation, the court necessarily was required to find that Papagolas was an agent of law enforcement. The agency discussion in this brief is, therefore, but another aspect of the compelled self-incrimination issue raised by Connecticut's Petition.

between Papagolas and the police.[2] "[A] necessary predicate to both constitutional claims is a determination that the incriminating statements to Papagolas that the defendant seeks to suppress were in fact elicited from the defendant as a result of interrogation by Papagolas acting as a police officer or as an agent of the police. See United States v. Henry, 447 U.S. 264, 269-70 . . . ." State v. Alexander, 197 Conn. 183, 496 A.2d 486, 488 (1985). The court explained that "The issue of agency, even in

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[2]The warning by law enforcement officers required under Miranda v. Arizona, 384 U.S. 436 (1965), applies to Fifth Amendment rights. Id. at 473-476. Agency also may arise as an issue in Sixth Amendment cases. Thus, before examining a claim of deprivation of either constitutional right by an informant, a court may determine whether the informant has associated himself with law enforcement by an agency relationship. Consequently, both Fifth Amendment cases and Sixth Amendment cases provide useful analysis when deciding the agency question.

a constitutional context, is primarily a question of fact [citation to Thomas v. Cox, 708 F.2d 132 (4th Cir.) cert. denied, 464 U.S. 918] . . ." and eventually concluded that the underlying factual situation could not sustain a finding of agency between Papagolas and law enforcement.

In Alexander v. State of Connecticut, 876 F.2d 277 (2nd Cir. 1989), the Second Circuit failed to give credence to the Connecticut court's finding of no agency relationship. The federal appellate court first determined:

> The Miranda safeguards apply in situations in which an incarcerated suspect is interrogated about an offense other than the one for which he is imprisoned. See Mathis v. United States, 391 U.S. 1, . . . (1968). When Papagolas visited Alexander after his request for counsel, his fifth amendment rights under Miranda had attached even though Papagolas's questioning involved an offense other than the one for which he was incarcerated. [Citation to Arizona v. Roberson, 486 U.S. ___ (1988).]

Id. at 282. The court continued, finding:

> Alexander's second confession was not a spontaneous, unsolicited statement, but a product of the pressures of Papagolas's systematic questioning in compliance with the requests of the police while Alexander was in custody and after he had demanded counsel. Alexander's implicit fifth amendment rights under Miranda were therefore violated.

Id. at 283. Of course, the court reached its conclusion after its in-depth examination of the circumstances involving Alexander, Papagolas and the police.

While the Supreme Court of Connecticut cited Thomas v. Cox among its authorities, the Second Circuit Court of Appeals did not, perhaps because the Fourth Circuit Court of Appeals reached an opposite conclusion in Thomas v. Cox after examining remarkably similar facts. Thomas was charged with murder and, during his incarceration in a county jail, he became acquainted with another inmate named Gregory. Id. at 133.

During general conversations, Thomas made several incriminating statements to Gregory throughout ensuing weeks. Later, Gregory encountered a county sheriff's investigator and told the investigator that Thomas was guilty, based on Thomas' statements. Gregory, however, declined to provide further information, including his refusal to speak with the local prosecutor. Later, however, Gregory encountered another investigator and provided him a sheet of paper containing a handwritten listing of Thomas' damaging admissions. The investigator did not instruct Gregory to interrogate Thomas, but did ask the prisoner to provide whatever additional information he might obtain. Gregory was not offered any inducement for his assistance. At a hearing during Thomas' trial, Gregory told the trial court that his motivation to seek information from Thomas was simple curiosity. Id. at 134.

In its examination of the case, the Fourth Circuit Court of Appeals concentrated on United States v. Henry, 447 U.S. 264 (1980). The court first stated that any legal classification of the relationship between Gregory and the police did not turn exclusively on Gregory's lack of monetary incentive. Id. at 134-135. Nonetheless, the court said, after observing that Henry had been a paid informant, "From these circumstances the Court in Henry was able to characterize the informant as a 'Government agent expressly commissioned to secure evidence.'" Id. at 135. After sustaining the trial court's factual findings (id. at 135), the court ruled:

> So far as this record discloses, for whatever reason Gregory acted--whether 'conscience,' as the state court found, or 'curiosity,' as he testified, or even conceivably from an unencouraged hope to curry favor, [citation omitted]--he could not properly be characterized, as could the

> informant in Henry, as 'a Government agent expressly commissioned to secure evidence.'

Id. at 136.

The Thomas court explained the holding, stating, "As we read Henry, the relationship between state and informer in that case must approach or reach the outer limits of the relationship required to 'attribute' to the state the private citizen's conduct as 'surreptitious interrogator.'" Id. at 137. Since the court declined to find such a relationship, it is apparent that in circumstances involving self-motivated informants acting without potential compensation by police, the Second and Fourth Circuit Courts of Appeals reach opposite conclusions regarding agency.

The Fourth Circuit Court of Appeals is not alone among federal appellate courts in disagreeing with the Second Circuit. In United States v. Taylor, 800 F.2d 1012 (10th

Cir. 1986), the Tenth Circuit Court of Appeals scrutinized another situation involving a jailhouse informant in the context of a Sixth Amendment violation. While Taylor was awaiting trial in a county jail in Oklahoma, he encountered Wayne Nave, with whom he had previously been employed. Id. at 1014. Taylor initiated a conversation and then admitted to Nave that he had committed several bank robberies. Nave later requested an audience with an agent of the Federal Bureau of Investigation. Nave outlined Taylor's admission to the agent. Subsequently, Taylor was moved into the same cell as Nave, where Taylor provided additional details of the robberies, which information Nave again relayed. In that instance, however, Nave testified at trial that he had hoped to be rewarded for his cooperation with law enforcement.

Nonetheless, he received no positive reply from the government. Id. at 1014-1015.

The Tenth Circuit recorded that Taylor's claim of error was based on United States v. Henry, and said, "We have been unable to find any bright line test for determining whether an individual is a Government agent for purposes of the Sixth Amendment right to counsel. [Citation to Thomas v. Cox.]" Id. at 1015. After agreeing with the Fourth Circuit that the dominant factor in the Henry ruling was Henry's informant's compensation and willingness to follow government instructions, the court found that Nave was not a government agent.

> Under the facts of this case, we hold that Nave was not a Government agent. No agreement was made between Nave and the Government and no benefits accrued to Nave for his cooperation. Any benefits which Nave hoped to obtain were mere expectancies. . . . In the absence of any express or implied quid pro quo underlying the relationship between Nave and the Government,

> [citation to Thomas v. Cox], and in the absence of any instructions or directions by the Government, we hold that Nave was not a Government agent. Taylor's right to counsel was not violated even if Nave had deliberately elicited incriminating statements from Taylor.

Id. at 1016. Consequently, the court found Nave's testimony was properly admitted into evidence. Id.

Other recent cases in federal appeals courts have provided no uniformity. One seeming departure from the Second Circuit holding in the case at bar was an earlier ruling by that court. In United States v. Calder, 641 F.2d 76 (2d Cir. 1981), the court examined underlying circumstances where, again, the appellant talked to an informant while incarcerated pending trial. Id. at 78. The informant, Joseph Bennett, reported the conversation to his attorney who, in turn, relayed it to the authorities. Two weeks after the conversation, Bennett entered into

a cooperation agreement with federal authorities regarding his own charges. Eventually, he also cooperated on Calder's case. Calder appealed his conviction, in part, on an alleged violation of his Fifth Amendment and Sixth Amendment rights. Id.

The Calder court, as usual, examined the facts in light of United States v. Henry. The court noted that Henry's underlying circumstances involved testimony by an informant being paid on a contingent fee basis. Id. at 78-79. The court also observed that this Court approved government introduction of testimony by another individual (also incarcerated with Henry) who was not paid and who made no prior arrangements with authorities to report Henry's incriminating statements. Id. at 79. The Second Circuit Court of Appeals held that "Bennett was not acting as a Government agent when he talked with Calder." Id.

The Tenth Circuit Court of Appeals made a similar analysis in United States v. Franklin, 704 F.2d 1183 (10th Cir.), cert. denied, 464 U.S. 845 (1983). There, Franklin visited his former wife, Anita Cooper, after committing a double murder. Id. at 1186. He made a passing remark to her about the murder, which remark did not overtly link him to the crime. After his arrest, however, Franklin again contacted Cooper and on that occasion unquestionably confessed to the murder. Id at 1187. The government used Cooper's testimony of Franklin's statements at trial, an action which Franklin challenged on the basis of the Fifth and Sixth Amendments.

As to his Sixth Amendment argument, the Court found that "Contrary to Franklin's suggestion, Massiah is inapplicable here . . . because his incriminating statement was not one 'which federal agents had

deliberately elicited from him.' [Citation to Massiah.]"[3] Id. at 1189. The court continued, "Furthermore, even had Franklin's right to counsel attached, his statement to Cooper would still be admissible because it was not deliberately elicited from him by federal agents. [Citation to United States v. Henry, supra.]" Id. After analyzing Henry, the court concluded, "In contrast, Cooper was neither paid nor instructed. She had been contacted by the FBI and had consented to have her phone tapped, but from the record before us it appears that, unlike the informant in Henry, she was a 'passive

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[3]This Court's decision in Massiah v. United States, 377 U.S. 201 (1964), held that admissions made via an informant's hidden radio transmitter to eavesdropping federal agents, after Massiah had secured the services of an attorney, were inadmissible as a violation of Massiah's Sixth Amendment rights.

listener.'" Id. at 1190. (Emphasis supplied.) Although she acted at the behest of federal agents, Franklin's ex-wife nonetheless was determined not to be a government agent.

The issue of an agency relationship due to entanglement between an informant and law enforcement often arises in the federal courts, but no "bright line" rule has, as yet, been authored by this Court. Although a majority of federal appellate courts hold that such a relationship is difficult to establish, no universal rule exists on the issue. The decision of the Second Circuit in this matter offers no particular guidance and conflicts with other federal decisions. Guidance on the issue of law enforcement/informant agency relationships is necessary for present and future judicial uniformity and the administration of justice.

II

THE SECOND CIRCUIT BROUGHT ITSELF INTO CONFLICT WITH DECISIONS OF THIS COURT AND SEVERAL COURTS OF APPEALS WHEN IT FAILED TO GIVE A PRESUMPTION OF CORRECTNESS TO THE FACTUAL FINDINGS OF THE CONNECTICUT SUPREME COURT.

As noted in the first argument, in its ruling in this case, the Second Circuit found, contrary to the findings of the Connecticut Supreme Court, that Papagolas was an agent of law enforcement for Fifth Amendment purposes. In coming to this finding, the Court of Appeals rejected the underlying facts as found by the state court, as well as this ultimate finding. Thus, the Second Circuit ruling in this case conflicts directly with prior precedent of this Court and with precedent in the Fourth and Tenth Circuits, even if it is accepted that the ultimate finding of agency is one of law or mixed law and fact. Sumner v. Mata, 455 U.S. 591, 593 (1982) (per curium); see, Miller v.

Fenton, 474 U.S. 104, 112 (1985), which held that even though the ultimate question of voluntariness of a confession is one of mixed fact and law, as to which 28 U.S.C. § 2254(d) does not apply, subsidiary findings of fact of the state court leading to this conclusion are entitled to the § 2254(d) presumption of correctness.

The Amici States contend, first, that the Connecticut Supreme Court's ultimate finding of fact that there was no agency relationship between Papagolas and the police should have been accorded a presumption of correctness under § 2254(d). As that court noted, 197 Conn. at 184-85, 496 A.2d at 489, Petition Appendix (hereinafter App.) at A-35, whether Papagolas was a state agent turned almost exclusively on the facts. See, Maine v. Moulton, 474 U.S. 159, 168 (1985); United States v. Henry; and Massiah v. United States, 377 U.S. at 202-204. See also Thomas

v. Cox. It is plain from a reading of the opinion of the Second Circuit, App. at A-1, and that of the Connecticut Supreme Court, App. at A-30, that the two courts came to differing conclusions based upon their respective view of the facts, not the law. They chose to believe--or emphasize--different evidence, although each had the same evidence before it. Notably, they did not set forth differing views on the law as to what constitutes a government agent. Such factual determinations are best left to the state courts, because they go to the power to determine credibility (Miller v. Fenton) and involve largely subsidiary determinations of historical fact. Id. at 112; 114; 117; Sumner v. Mata; Cuyler v. Sullivan, 446 U.S. 335, 341-342 (1980).

The Amici States admit that there is no bright line rule as to when a finding is subject to the § 2254(d) presumption. This

Court has held that ultimate voluntariness of a confession is not subject to the presumption, Miller v. Fenton, 474 U.S. at 117-118, but that whether an informant "deliberately elicited" statements from a fellow prisoner is subject to the presumption, Kuhlmann v. Wilson, 477 U.S. 436, 460-461 (1986).

Numerous other factual and legal issues have been held subject or not subject to the presumption. Ineffectiveness of counsel is not subject to the presumption, Strickland v. Washington, 466 U.S. 668 (1984); felony murder death penalty criteria are, Cabana v. Bullock, 474 U.S. 376 (1986); harmless error, as an ultimate conclusion, is not, Rushen v. Spain, 464 U.S. 114 (1983); pretrial identification procedures, as to the ultimate legal conclusion, are not, Sumner v. Mata, 455 U.S. 491 (1982); juror bias is fully subject to the presumption, Patton v. Yount,

467 U.S. 1025 (1982), Wainwright v. Witt, 469 U.S. 412 (1985); a finding of prosecutorial misconduct is not, in its final ultimate form, subject to the presumption, Smith v. Phillips, 455 U.S. 209 (1982). An ultimate finding of guilty plea voluntariness is not subject to the presumption, Marshall v. Lonberger, 459 U.S. 422 (1983); nor is an ultimate finding of waiver of the right to counsel, Brewer v. Williams, 430 U.S. 387 (1977); competency to proceed to trial, even as an ultimate fact, is subject to the presumption, Maggio v. Fulford, 462 U.S. 111 (1983).

This Court has yet to determine whether a finding that a person is not an agent of law enforcement, as made in this case, is subject to the presumption. From the cases cited in the preceding paragraph, it would appear that several factors are critical to this determination. If the federal court is

merely applying a federal standard to facts found by the state court, the presumption would be less likely to apply. This Court's prior precedent also figures importantly in the determination. See Miller v. Fenton, 474 U.S. at 115.

The nature of the inquiry, whether historical-factual or largely legal, is also important. If the question is one of determination of credibility, it is much more likely that § 2254(d) will be applicable. Miller v. Fenton, 474 U.S. at 116-117. Also considered important in Miller was whether the critical facts took place before a court or in secret. Id. at 117. The Amici States submit that the majority of these factors militate in favor of applicability of the presumption in this case, even to the ultimate finding of no agency relationship. Whether there was agency is largely a function of the historical facts.

If those historical facts are viewed as found by the Connecticut courts, a finding of no agency relationship is likely. Certainly, some of the factors would argue in favor of considering the agency finding to be one of law or mixed fact and law. For example, the critical facts took place in secret, not before a court of record. A determination of which witnesses to believe is, however, clearly subject to the presumption. Sumner v. Mata, 455 U.S. at 597; see, Kuhlmann v. Wilson, 477 U.S. at 459-460, wherein this Court held that a question whether certain admissions were "deliberately elicited" by a police agent was subject to the presumption.

Even if the ultimate finding of no agency relationship was not subject to the presumption, the court of appeals should have considered the presumption and made a written finding as to why it was not applicable. By simply disagreeing but failing to discuss the

matter, the court of appeals brought itself into conflict with prior decisions of this Court. Sumner v. Mata, 449 U.S. at 551; Sumner v. Mata, 455 U.S. at 593. The decision also conflicts with that of at least one other circuit court of appeals. Thomas v. Cox, 708 F.2d at 135. The writ could and should be granted for this reason alone.

Even assuming for the sake of argument that the ultimate finding of non-agency is not subject to the § 2254(d) presumption, subsidiary questions of fact underlying this ultimate finding are. In each of the cases where this Court has found § 2254(d) inapplicable to the ultimate factual or legal finding, it has, nonetheless, found the presumption applicable to subsidiary questions of fact. See e.g. Sumner v. Mata, 455 U.S. at 597.

The Court of Appeals took a significantly different approach to the

subsidiary questions of fact than that of the Connecticut Supreme Court. The Connecticut Supreme Court found (197 Conn. at 187, 496 A.2d at 490, App. at A-37) that there was conflicting testimony about whether Rearick and Jacewicz, police officers, ever asked Papagolas to go to the jail to get information, as opposed to simply supporting his self-initiated decision to go. The Court found that police provided transportation services and that during that transportation Papagolas told them what Alexander told him. Further, the police neither initiated contact with Papagolas nor directed his activities. He had no previous affiliation with the police and was neither rewarded monetarily nor promised any favors in return for his cooperation. The Connecticut Supreme Court also held (id. at note 4) that there was no evidence indicating that the police offered Papagolas any rewards, such as not being

fined for driving without a license, obtaining recommendations to the Florida State Police or receiving a film projector, in exchange for obtaining incriminating evidence from Alexander.

In the face of these clearly factual, subsidiary findings from the Connecticut Supreme Court, the Second Circuit made its own findings. That court found, 876 F.2d at 282, App. at A-11-12, that the police persuaded Papagolas to continue his visits to Alexander and to advise them about what he learned. The Second Circuit also found that the police specifically asked Papagolas to get more information from Alexander. That court also found that the police "debriefed Papagolas" on the ride back to his home and refrained from giving him a citation for driving without a license. Each of these findings, critical to the Second Circuit's ultimate finding of agency, is directly

opposed to the findings of the Connecticut Supreme Court. Each is a finding of pure historical fact. No explanation of the Second Circuit's rejection of the Connecticut Supreme Court findings is given in its opinion. This course of judicial proceeding is directly contrary to 28 U.S.C. § 2254(d) and to Sumner v. Mata, 449 U.S. at 551. Sumner requires, at a minimum, that if the finding of a state court is to be rejected, the federal court must give, in its opinion granting the writ, the reason which led it to conclude that any of the first seven factors of § 2254(d) are present or the reason which led it to conclude that the state findings it is rejecting are not fairly supported by a record.

The Second Circuit not only did not fulfill this clear obligation, but it failed even to cite to § 2254(d) when rejecting the Connecticut court's findings. Section

2254(d) requires a greater respect for the findings of state courts than was granted in this instance by the Second Circuit. For this additional reason, the writ should be granted.

CONCLUSION

Because a conflict exists between the circuits as to when a person becomes an agent of law enforcement, this Court should grant the petitioned writ. In addition, the Second Circuit in this case failed to accord the factual findings of the Connecticut Supreme Court the deference to which they are entitled under 28 U.S.C. § 2254(d). The Amici States therefore urge this Court to

grant the Writ of Certiorari, and to reverse the decision below.

Dated this 25th day of October, 1989.

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